10

SUPREME COURT OF THE UNITED STATES.

No. 264.

THE AETNA INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM HERRYFORD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MISSOURI.

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1 MISSOURI DISTRICTS, *sct:*

Pleas before the honorable the circuit court of the United States for the districts of Missouri, at the April term, 1869.

WILLIAM HERYFORD, PLAINTIFF,
ag'st
THE AETNA INSURANCE COMPANY, DEFENDANT.

Transcript filed.

Be it remembered that heretofore, to wit, on the 16th day of July, A. D. 1868, there was filed, in the office of the clerk of the circuit court of the United States in and for the districts of Missouri, the following transcript, to wit:

Transcript.

STATE OF MISSOURI, *County of Howard, sct:*

In the Howard circuit court.—December term, 1865.

Be it remembered that on the 2d day of October, 1865, the following petition was filed in the office of the clerk of the circuit court of the county aforesaid; which is in the following words and figures, to wit:

In the Howard circuit court.—December term, 1868.

STATE OF MISSOURI, *County of Howard, ss:*

2 *Petition.*

WILLIAM HERYFORD, PLAINTIFF,
against
AETNA INSURANCE COMPANY, DEFENDANT.

The plaintiff states that the defendant is and was, at the several times hereinafter mentioned, a corporation created by a law of the State of Connecticut, with power to insure dwelling-houses and other property against loss or damage by fire, and to issue policies of insurance, and to contract and be contracted with, and to sue and be sued, and to make and issue the policy of insurance upon which this suit is brought.

And the plaintiff further states that the said defendant, under the laws of the State of Missouri, established agencies to transact their business in the State of Missouri, and for this purpose appointed J. S. Thomson their agent at Glasgow, in the State of Missouri, and appointed Edward Morrison and William H. Holland, their chief agents for the State of Missouri, located at the city of Saint Louis, in said State of Missouri, and now acting as their agents under the laws of the State of Missouri.

And the plaintiff further states that the defendant heretofore, to wit, on the 20th day of February, in the year of our Lord 1864, made, executed, and delivered to the plaintiff their certain policy of insurance, in writing, of the date last aforesaid, signed by their secretary and president, and countersigned at Glasgow, aforesaid, by their said agent J. S. Thomson, who, for and on behalf of said defendant, delivered said policy of insurance thus executed to the plaintiff, which said policy of

insurance is herewith filed as an exhibit, marked "A," by which
3 said policy of insurance the said defendant, in consideration of the sum of twenty-five dollars to them in hand paid by the plaintiff, did insure the said plaintiff against loss or damage by fire to the amount of twenty-five hundred dollars for the term of one year from the 20th day of February, 1864, to the 20th day of February, in the year of our Lord eighteen hundred and sixty-five, at noon, on his two-story frame dwelling-house, situated in Chariton County, in the State of Missouri, on the S. E. qr. of section 10, township 52, range 17, which was, at the date of said policy of insurance, occupied by plaintiff as a dwelling; by which said policy of insurance the defendant did then and there promise and agree with plaintiff to make good unto him, his executors, administrators, and assigns, all such immediate loss or damage, not exceeding in amount the said sum of twenty-five hundred dollars, as should happen by fire to the property of plaintiff, as above specified, from the 20th day of February, one thousand eight hundred and sixty-four, (at 12 o'clock at noon,) unto the 20th day of February, one thousand eight hundred and sixty-five, (at 12 o'clock at noon,) the said loss or damage to be estimated according to the true actual cash value of the property at the time the same should happen, and to be paid within sixty days after notice and proof thereof, made by the assured, in conformity to the conditions annexed to said policy; and it was provided by said policy, and thereby endorsed, that said company (the defendant) should not be liable to make good any loss or damage by
4 fire which might happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, or any loss by theft at or after a fire; and it was also provided in & by said policy of insurance, that in case the assured then had any other insurance against loss by fire on the property thereby insured, and not notified to said company and mentioned in or endorsed upon said policy, then said insurance should be void and of no effect; and it was also provided that if the said assured or assigns should thereafter make any other insurance on the same property, and should not, with all reasonable diligence, give notice thereof to said company, and have the same endorsed on said policy of insurance, or otherwise acknowledged by them in writing, then said policy to cease, and be of no further effect; and in case of any other insurance upon the property thereby insured, whether prior or subsequent to the date of said policy, it was provided that the assured should not, in case of loss or damage, be entitled to demand or recover of said company any greater portion of the loss or damage sustained than the amount thereby insured should bear to the whole amount insured on said property. And it was also further agreed and declared to be the true intent and meaning of the said parties to said policy, that in case the above-mentioned property should at any time after the making, and during the continuance of said insurance, be appropriated, applied, or used, to or for the purpose of carrying or exercising therein any trade, business, or vocation,
5 denominated hazardous, extra-hazardous, or included in the memorandum of special rates, in the conditions annexed to said policy, or for the purpose of storing or vending therein any of the articles, goods, or merchandise in the conditions aforesaid, denominated hazardous, extra-hazardous, or included in the memorandum of special rates, unless therein otherwise specially provided for, or thereafter should be agreed to by said company in writing, and added to or endorsed upon said policy, then, and from thenceforth, so long as the same should be so appropriated, applied, or used, the said policy was to cease

and be of no force or effect. And it was provided that said policy was made and accepted in reference to the conditions thereto annexed, which were to be used and resorted to in order to explain the rights and obligations of the parties thereto in all cases not therein otherwise specially provided for.

And the plaintiff further states that the said conditions referred to as being annexed to said policy read in the following words and figures, to wit:

1. Goods not hazardous are such as are usually kept in dry-goods stores, including coffee, flour, household furniture, and linen, indigo, rice, spices, sugars, teas, and other articles not combustible.

2. The following trades and occupations, goods, wares, and merchandise are denominated hazardous, viz: Alcohol, basket-sellers, brush-makers' stock, cabinet furniture, china, earthen, or glass ware, or plate-glass, (in boxes, crates, or casks,) copper-plate printers, cotton in bales, hat-finishers, (without use of fire, except for heating their irons,) hardware and cutlery, jewelers' stock, liquor in glass, (unpacked,) looking-glasses in boxes, manilla grass in bales, paints ground in oil, paper-hanging, porter-houses, potash, pocket-book makers' stock, printers of newspapers, rags in packages, sailmakers, ship-chandlers, spirituous liquors, cigar-makers, stationers' stock, snuff-makers, threshed grain, tin or sheet-iron workers, victualing-houses, watchmakers' stock, or iron tools, wine in glass, (in packages,) window or plate-glass in packages.

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3. The following trades and vocations, goods, wares, and merchandise are denominated extra-hazardous, viz: Basket-makers, straw-bleachers, booksellers' stock, blacksmiths, boat-builders, brass-founders, china, earthen, or glass ware, or looking-glasses unpacked, confectioners' stock, cotton unpacked, coopers, coppersmiths, druggists, and apothecaries, fur-dressers, flax in bales, fringe-makers, gunmakers or smiths, grate-makers, hay pressed in bundles, hemp in bales, ink-makers, lamp manufacturers, lamp-sellers' stock, lithographers, milliners' stock, morocco manufacturers, optical and mathematical instrument-makers, printers' stock, perfumers' stock, phosphorus, pictures and prints, printers of books and jobbing, plate or plated-ware manufactories, pocket-book, plumbers, pewterers, salt-petre, silversmiths, stables, (private,) spirits of turpentine, stove manufactories, tobacco manufacturers, toy-keepers' stock, type or stereotype manufacturers, varnish, window and plate-glass unpacked. Mem.—Bakers, bark-mills, blind-makers, brewers, book-binders, blacksmiths, boat-builders, cabinet-makers, carpenters, joiners, chair or coachmakers' shops, chemists, cotton-mills, dyers, forges, fences, frame-makers, furriers, fulling-mills, grist-mills, hat manufactories, houses building or repairing, ink or ivory-black or lamp-black manufactories, livery-stables, lumber or mahogany yards, malt-houses, metal and other mills of all kinds, musical-instrument makers, oilmakers, and block-makers' shops, paper-mills, rope-makers, saw-mills, ship-builders' stock in the yard, ships or other vessels in port, or their cargoes, or when building or repairing, steam-engines, or boats, tanneries, tallow-melters and chandlers, lumber-yards, woolen mills, and generally all manufacturing establishments, and all trades requiring the use of fire, heat, or steam-power not before enumerated, will be insured at special rates of premium.

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☞ The following are not to be insured at any rate of premium, viz: Brimstone works, distillers, flax-mills, gunpowder, oil-boiling houses, oakum factories, panoramas, or other scenic painting, patent-leather manufactories, sash and blind factories, snuff-mills, steam planing-mills,

tar-boiling houses, theatres, turpentine manufactories, varnish-makers, steam saw-mills, sugar-refineries, and India-rubber factories.

4. Applications for insurance must specify the construction and materials of the building to be insured, or containing the property to be insured, by whom occupied, whether as a private or how otherwise, its situation with respect to contiguous buildings, and their construction and materials; whether any manufactory is carried on within or about it, and in case of goods and merchandise, whether they are of the
8 description denominated hazardous, extra-hazardous, or included in the memorandum of special rates; and a false description by the assured of a building, or of its contents, or the omission to make known any fact material to the risk, or in a valued policy an over-valuation, shall render absolutely void a policy issued upon such description or valuation. But the office will be responsible for surveys and valuations made by its agents. If, after insurance is effected either by the original policy or by the renewal thereof, the risk be increased by any means within the control of the assured, or if such buildings or premises shall be, with the assent of the assured, occupied in any way so as to render the risk more hazardous than at the time of insuring such insurance shall be void and of no effect. If during this insurance any subsequent insurance should be made upon the property hereby insured, which, with the sum or sums already insured, should, in the opinion of the said Aetna Insurance Company, amount to an over-insurance, or the risk be increased by the erection of buildings, or by the use or occupation of neighboring premises or otherwise; or if for any other cause, the company shall so elect, it shall be optional with the company to cancel this policy after notice given to the assured or his representatives of their intention to do so, in which case the company will refund the premiums for the unexpired time.

5. No insurance, whether original or continued, shall be considered as binding until the actual payment of the premium.

9 6. Goods held in trust or on commission are to be insured as such, otherwise the policy will not cover such property; and in case of loss the names of the respective owners shall be set forth in the preliminary proof of such loss, together with their respective interest therein. Goods on storage must be separately and specifically insured. If the interest on property insured be leasehold or that of mortgage, or any other interest not absolute, such must be made known to this company and expressed in the policy.

7. Policies of insurance subscribed by this company shall not be assignable without the consent of the company expressed by endorsement made thereon. In case of assignment without such consent, whether of the whole policy or of any interest in it, the liability of the company in virtue of such policy shall thenceforth cease. And in case of any transfer or change of title in the property insured by this company, or of any undivided interest therein, such insurance shall be void and cease.

8. This company will not be liable for damage to property by lightning aside from fire, nor for damage occasioned by the explosion of a steam-boiler, nor for damage by fire resulting from such explosion, nor explosions caused by gunpowder, gas, or other explosive substances; nor for damage occasioned by the use of camphene, spirit-gas, or burning fluid, unless otherwise expressly provided. The keeping of gunpowder for sale, or on storage upon or in the premises insured without written permission in the policy, shall render it void.

10 9. Jewels, watches, plate, medals, musical instruments, paintings, statuary, sculptures, & curiosities are not to be deemed to

be included in any insurance, unless an inventory thereof accompany the application for insurance, or is inserted in the policy.

10. In case of fire or loss, or damage thereby, it shall be the duty of the insured to use all possible diligence in taking and preserving the property; and if they shall fail so to do, this company shall not be held answerable to make good the loss and damage sustained in consequence of such neglect. And it is also mutually understood that there can be no abandonment to the insurers of the subject insured.

11. All persons insured by this company, and sustaining loss or damage by fire, are forthwith to give notice thereof to the company, or its agents; and as soon as possible to deliver in a particular account of such loss or damage, signed with their own hands and verified by their oath or affirmation; they shall also declare on oath whether any and what other insurance has been made on the same property; what was the whole value of the subject insured; what was their interest therein; in what general manner (as to trade, manufacturing, merchandise, or otherwise) the building insured or containing the subject insured, and the several parts thereof, were occupied at the time of the loss, and who were the occupants of such buildings; and when and how the fire originated, so far as they know or believe; and procure a certificate (under the hand of a magistrate or notary public most contiguous to the place of the fire, and not concerned in the loss as a creditor or
11 otherwise, or related to the insured or sufferers) that he is acquainted with the character and circumstances of the person or persons insured, and has made diligent enquiry into the facts set forth in their statement, and knows or verily believes that he, she, or they, really, and by misfortune, and without fraud or evil practice, hath or have sustained by such fire loss and damage to the amount therein mentioned; and also, if required, shall produce their books of account and other proper vouchers; and shall also, if required, submit to an examination, under oath, by the agent or attorney of the company, and answer all questions touching his, her, or their knowledge of anything relating to such loss or damage, or to their claim thereupon, and subscribe such examination, the same being reduced to writing; and until such proof, declarations, and certificates are produced, and examination, if required, the loss shall not be deemed payable. Also, if there appear any fraud or false swearing, the insured shall forfeit all claim under the policy. Damage to buildings not totally destroyed shall be appraised by disinterested men mutually agreed upon by the assured and the office, or its agents; and where merchandise or other personal property is partially damaged, the insured shall forthwith cause it to be put in as good order as the nature of the case will admit, assorting and arranging the various articles according to their kind; and shall cause a list or inventory of the whole to be made, naming the quantity and cost of each kind. The damage shall then be ascertained by the examination and appraisal of said damage on each article by disinterested ap-
12 praisers mutually agreed upon, whose detailed report in writing shall form a part of the proof required to be furnished by the claimant, one-half of the appraisers' fees to be paid by the insurers. A copy of the written portion of the policy to be given in the affidavit of the claimant in all cases. Also copy of all other policies insuring same property, & sharing payment of the same loss with this company. A claim for loss or damage on a policy assigned when there is no actual sale or transfer of the property insured, proofs of loss shall be made by the assured, in conformity with the conditions of this policy, in like manner as if no assignment had been made; otherwise this policy shall

be void, and of no force or validity whatever, and all liability on the part of this company shall cease; reinsurance for any other insurance company to be on the basis of joint liability with said company, and on no account will this company be liable for a sum greater than such portion as the sum hereby reinsured bears to the whole sum insured on the property by the company reinsured; and in case of loss this company to pay their pro rata proportion at the same time, manner, and form as the company reinsured. Plans and specifications of buildings, machinery, and fixtures damaged or destroyed, must be furnished free of expense when requested. When an inventory of merchandise or other property, sound or damaged, is to be taken in adjusting a claim for loss or damage, this company shall have notice, and the appointment of one or more assistants to complete such listing of property, when required by its agent.

12. Payment of losses shall be made in sixty days after the loss
13 shall have been [been] ascertained and proved, and in case differences shall arise touching any loss or damage, it may be submitted to the judgment of arbitrators, indifferently chosen, who award in writing shall be binding on the parties. In case of any loss on or damage to the property insured, it shall be optional with the company to replace the articles lost or damaged with others of the same kind and equal goodness, and to rebuild or repair the building or buildings within a reasonable time, giving notice of their intention so to do within thirty days after the preliminary proofs shall have been received at the office of the company.

13. Insurance once made may be continued for such further time as may be agreed on, the premium thereon being paid, and a renewal receipt being given for the same, and it shall be considered as continued under the original representation in so far as it may not be varied by a new representation in writing, which in all cases it shall be incumbent on the party insured to make when the risk has been changed, either within itself or by the surrounding or adjacent buildings.

14. When a policy is made and issued upon a survey and description of certain property, such survey and description shall be taken and deemed to be a part and portion of such policy and warranty on the part of the assured.

15. Where property insured by this company is damaged by removal from a building in which it is exposed to loss by fire, said damage shall be borne by the insured and the insurers in such proportion as the whole sum insured bears to the whole value of the property insured, of which proof in due form shall be made by the claimant.

14 16. The company will not be answerable for any loss arising from the use of fires in buildings unprovided with a good and substantial stone or brick chimney, or in consequence of neglect or deviation from the laws or regulations of police made to prevent accidents from fires in places where laws and regulations on the subject exist.

17. It is furthermore hereby expressly provided that no suit or action against said company for the recovery of any claim upon, under, or by virtue of this policy shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall occur; and in case any such suit or action shall be commenced against said company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.

18. In case this insurance shall be on property situated over one mile

from the city, town, or village in which the agency is located where the policy is filled and countersigned, it is to be a condition of the insurance, in the event of any loss covered by this policy, one-fourth of such loss is to be borne by the assured, and three-fourths by this company, (not exceeding the sum insured;) nor, in the event of additional insurance by other companies on property so situated any greater proportion of said loss than may be necessary to make good said three-fourths proportion of the loss sustained, except in the case of buildings damaged or
15 partially destroyed which have been surveyed and values approved by a duly authorized agent or surveyor of this company.

And the plaintiff further states that he was the owner, and alone interested in said dwelling-house so insured as aforesaid, and that said dwelling-house so being his property as aforesaid was consumed and totally burned up by fire on or about the 7th day of November, in the year of our Lord 1864, and that the actual cost value of said dwelling-house at the time it was so burned up and destroyed was thirty-five hundred dollars, and plaintiff states that he sustained loss by the burning up as aforesaid of his said dwelling-house to the amount of thirty-five hundred dollars; and he states that his said loss and damage by fire did not happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power; nor did said plaintiff at the time said policy was executed have any other insurance on said property against loss by fire, nor has he at any time since the execution of said policy made any other insurance on his said property thereby insured.

And the plaintiff further states that, in accordance with the conditions of said policy, he gave the defendant immediate notice of his said loss by fire by notifying their said agent at Glasgow, and has made out & presented to the agent of said company, in accordance with the conditions of said policy, and proofs of his said loss and damage; and he further states that he has fully complied with [the] and performed all the conditions and stipulations of said policy on his part to be performed; but the said defendant has not performed the conditions and stipulations on their part to be performed, but defendant has
16 wholly neglected and refused to perform the same; and plaintiff states that the defendant, although requested so to do, has wholly neglected and refused, and still neglects and refuses, to adjust his said loss, an refuses to pay to plaintiff the said sum of twenty-five hundred dollars, the amount for which defendant insured his said dwelling-house, as heretofore set forth; and defendant wholly neglects and refuses to pay him the same, or any part thereof; nor has the defendant rebuilt the said dwelling-house, nor has the defendant given any notice of their intention to rebuild the same, or in any manner whatever complied with the terms of said policy, whereby and by means of the premises the said defendant has become and is liable to pay to the plaintiff the amount of his said insurance, to wit, the said sum of twenty-five hundred dollars, with interest thereon at the rate of six per centum per annum from the time of said loss; and for which said sum and the interest the plaintiff asks judgment, and also for such other relief as he is entitled to.

(Signed) ADAMS & SHACKELFORD,
Att'ys for Pl'ff.

Affidavit.

William Heryford, the plaintiff, makes oath that he believes that hi foregoing petition and the matters therein as stated are true.

(Signed) WILLIAM HERYFORD.

Sworn and subscribed to this 21st day of June, 1865, before me, a notary public in and for the county of St. Louis, and State of Missouri.

In testimony whereof I have hereunto set my hand and seal this
17 twenty-first day of June, A. D. one thousand eight hundred and sixty-five.

[L. S.] (Signed) J. HARDEMAN CORDELL.
Notary Public.

And on the foregoing petition the following writ was issued, to wit:

Writ.

STATE OF MISSOURI, *County of Howard, set:*

The State of Missouri to the sheriff of Howard County, greeting:

We command you to summon Aetna Insurance Company to be and appear before the judge of the Howard circuit court, at Fayette, in Howard County, on the first Monday of December next, and answer the foregoing petition of William Heryford, plaintiff. And have you then and there this writ.

Witness Cha's H. Stewart, clerk of said court, under the seal thereof, at office in Fayette, on the 5th day of Oct., 1865.

[L. S.] (Signed) C. H. STEWART, *Cl'k.*

On which writ the following return was made by the sheriff of Howard County, to wit:

Return.

I certify that I executed the within petition and writ by delivering a true copy of the same to the within-named James S. Thomson, agent of the within-named insurance company in Howard County, Missouri, on the 5th day of October, 1865.

(Signed) P. M. JACKSON, *Sh'ff H. C.*

And afterwards, to wit, on the 4th day of December, 1865, the following order was made in said court, to wit:

18 *Order.*

WILLIAM HERYFORD, PLAINTIFF,
vs.
THE AETNA INSURANCE COMPANY, DEFENDANT. } Civ. act.

And now, on this day, the defendant comes and appears to the action of the plaintiff, and afterwards, on the same day, files application for the removal of said cause to the United States circuit court, and files his bond.

Which motion is in the following words and figures, to wit:

In the circuit court for the county of Howard, State of Missouri.

Motion.

THE AETNA INSURANCE COMPANY, PLAINTIFF,
vs.
WILLIAM HERYFORD, DEFENDANT.

And now comes the said Aetna Insurance Company, defendant herein, and moves the said court make an order in this cause directing the re-

moval of the said cause to the circuit court of the United States for the district of Missouri, in conformity with the act of Congress of the United States, approved September 24th, 1789, entitled "An act to establish the judicial courts of the United States," for the reasons that the said plaintiff is a citizen of Missouri, and the said defendant is a corporation incorporated under the laws of the State of Connecticut, and has its principal place of business in Hartford, in said State of Connecticut, and is a citizen thereof, and that the stockholders of said corporation are not citizens of the State of Missouri. The said defendant further
19 states that the matter in controversy in said suit exceeds the sum of five hundred dollars.

The Aetna Insurance Company,
(Signed) By GLOVER & SHEPLEY,
Their Att'ys.

STATE OF MISSOURI, *County of St. Louis, sct:*

W. Henry Holland, agent of said defendant, being duly sworn, on his oath states that the within petition and the matters and things as therein stated he believes are true.

(Signed) W. HENRY HOLLAND.

Sworn and subscribed before me this 21st day of November, 1865.
[SEAL.] (Signed) EDWARD J. MITCHELL,
Notary Public, St. Louis Co.

Copy of the bond filed:

Bond.

Know all men by these presents that one W. Henry Holland, as principal, and James W. Harper, as security, are held and firmly bound unto William Heryford in the full and just sum of three thousand dollars; to the payment of which, well and truly to be made, we bind hereby ourselves, and heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 4th day of December, eighteen hundred and sixty-five.

The condition of the above-bounden obligation is such that whereas the Aetna Insurance Company has this day filed their petition in the circuit court of Howard County, in the State of Missouri, in a certain suit therein pending, wherein William Heryford is plaintiff and said company is defendant, for a removal of the said cause from said court to the circuit court of the United States for the district of Missouri,
20 and if the said Aetna Insurance Company shall, on the first of the next session of the said circuit court of the United States for the district of Missouri, enter and file in said circuit court of the United States copies of the process and proceedings in said suit, then this obligation to be void; otherwise to be in full force and virtue.

(Signed) W. HENRY HOLLAND. [SEAL.]
" J. W. HARPER. [SEAL.]

And afterwards, on the 5th day of Dec'r, 1865, the following was had, to wit:

Order.

WILLIAM HERYFORD, PL'FF,
vs.
THE AETNA INSURANCE COMPANY.

Now, at this day, comes the plaintiff, by his attorney, and files his re-

ply to the application of the defendant to remove this cause to the circuit court of the United States.

Which reply is in the following words and figures, to wit:

Replication.

In the Howard circuit court.

WILLIAM HERYFORD, PLAINTIFF,
against
THE AETNA INSURANCE COMPANY.

Now, at this day, the plaintiff comes and says that the application made by the defendant to remove this cause to the circuit court of the United States ought not to be granted—

1st. Because the petition does not state facts sufficient under the act of Congress to authorize this court to order such removal.

21 2d. Because the defendant is a corporation; is not, within the meaning of the law of Congress, a citizen of another State.

3d. The petition does not state that none of the stockholders are citizens of the State of Missouri.

4th. The defendant is estopped from making this application for the reason that under the laws of the State of Missouri regulating foreign insurance companies doing business in this State, the defendant voluntarily gave jurisdiction to the State courts in all cases where insurance was made on property in this State, by filing in the office of the clerk of the county court a resolution of the board of directors of said corporation agreeing to give such jurisdiction, and authorizing the service of process on the agents of the company in this State; and having voluntarily accepted the conditions imposed by the laws of the State of Missouri as a condition precedent to transacting business in this State, cannot now divest this court of jurisdiction under & by virtue of the said act of Congress.

5th. Because this policy sued upon by the plaintiff was issued by an agent of defendant in the State of Missouri, under and by virtue of the authority granted by the laws of this State.

(Signed) ADAMS & SHACKELFORD,
Att'ys for Plaintiff.

And afterwards, on the same day, the following order was made in said cause:

Order overruling motion to remove.

WILLIAM HERYFORD, PLAINTIFF,
vs.
THE AETNA INSURANCE COMPANY. } Civ. act.

22 The motion heretofore filed to remove this cause to the United States circuit court coming on to be heard, and by the court fully understood, the same is continued until to-morrow morning.

And afterwards, to wit, on the 6th Dec'r, 1865, the following order was made, to wit:

WILLIAM HERYFORD, PLAINTIFF,
vs.
THE AETNA INSURANCE COMPANY. } Civ. act.

The motion heretofore filed in this cause to remove said cause to the

United States circuit court coming on again to be heard, and the court, after hearing the arguments of counsel, and being by the court fully understood, the same is overruled. To the overruling of which the defendant excepted and filed bill of exceptions, which are signed and sealed by the court as a part of this record.

Which bill of exceptions is in the following words and figures, to wit:

Bill of exceptions.

In the circuit court of Howard County, State of Missouri.—Dec'r term, 1865.

WILLIAM HERYFORD, PLAINTIFF,
vs.
THE AETNA INSURANCE COMPANY, DEF'T.

Be it remembered that the defendant in the above-entitled cause filed the following petition to remove said cause to the circuit court of the United States for the district of Missouri, to wit:

23 In the circuit court for the county of Howard and State of Missouri.

WILLIAM HERYFORD, PLAINTIFF,
vs.
THE AETNA INSURANCE COMPANY, DEFENDANT.

And now comes the said Aetna Insurance Company, defendant herein, and moves the said court make an order in this cause directing the removal of the said cause to the circuit court of the United States for the district of Missouri in conformity with the act of the Congress of the United States, approved September 24, 1789, entitled "An act to establish the judicial courts of the United States," for the reasons that the said plaintiff is a citizen of Missouri, and the said defendant is a corporation incorporated under the laws of the State of Connecticut, and has its principal place of business in Hartford, in said State of Connecticut, and is a citizen thereof, and that the stockholders of said corporation are not citizens of the State of Missouri. The said defendant further states that the matter in controversy in said suit exceeds the sum of five hundred dollars.

The Aetna Insurance Company,

By GLOVER & SHEPLEY,
Their Att'ys.

STATE OF MISSOURI, *County of St. Louis, sct:*

W. Henry Holland, agent of said defendant, being duly sworn, on his oath states that the within petition and the matter and things as therein stated he believes are true.

(Signed) W. HENRY HOLLAND.

Sworn and subscribed before me this 21st day of November, 1865.

(Signed) EDWARD J. MITCHELL,
Notary Public, St. Louis County.

24 And also filed the following bond, to wit:

Know all men by these presents that we, W. Henry Holland, as prin

cipal, and James W. Harper, as security, are held and firmly bound unto William Heryford in the full and just sum of three thousand dollars; to the payment of which, well and truly to be made, we bind hereby ourselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated the 4th day of December, eighteen hundred and sixty-five.

The condition of the above-bounden obligation is such that, whereas the Aetna Insurance Company has this day filed their petition in the circuit court of Howard County, in the State of Missouri, in a certain suit therein pending, wherein William Heryford is plaintiff and said company is defendant, for removal of the said cause from said court to the circuit court of the United States for the district of Missouri; and if the said Aetna Insurance Company shall, on the first of the next session of the said circuit court of the United States for the district of Missouri, enter and file in said circuit court of the United States copies of the process and proceedings in said suit, then this obligation to be void; otherwise to be in full force and virtue.

(Signed) W. HENRY HOLLAND. [SEAL.]
" J. W. HARPER. [SEAL.]

And the plaintiff filed the following motion, objecting to the application aforesaid, to wit:

25 *Motion.*

In the Howard circuit court.

WILLIAM HERYFORD, PLAINTIFF,
vs.
THE AETNA INSURANCE COMPANY, DEF'D'T.

Now, at this day, the plaintiff comes and says that the application made by the defendant to remove this cause to the circuit court of the United States ought not to be granted—

1st. Because the petition does not state facts sufficient under the act of Congress to authorize this court to order such removal.

2nd. Because the defendant is a corporation; is not, within the meaning of the law of Congress, a citizem of another State.

3rd. The petition does not state that none of the stockholders are citizens of the State of Missouri.

4th. The defendant is estopped from making this application for the reason that, under the laws of the State of Missouri regulating foreign insurance companies doing business in this State, the defendant voluntarily gave jurisdiction to the State courts in all cases where insurance was made on property in this State, by filing in the office of the clerk of the county court a resolution of the board of directors of said corporation, agreeing to give such jurisdiction, and authorizing the service of process on the agents of the company in this State, & having voluntarily accepted the conditions imposed by the laws of the State of Missouri, as a condition precedent to transacting business in this State, cannot now divest this court of jurisdiction under & by virtue of the said act of Congress.

5th. Because this policy, sued upon by the plaintiff, was issued
26 by an agent of defendant in the State of Missouri, under and by virtue of the authority granted by the laws of this State.

(Signed) ADAMS & SHACKELFORD,
Att'ys for Plaintiff.

And afterwards, to wit, on the same day, upon the hearing of said application, the plaintiff introduced the following evidence contained in a paper writing, to wit:

Deposition of witness produced, sworn, and examined on the 3d day of June, 1866, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day, at the office of Thomas Shackelford, in the county of Howard, and State of Missouri, before Thomas W. Morehead, justice of the peace, in a certain cause now depending in the circuit court of the county of Howard, in the State of Missouri, between William Heryford, plaintiff, and Aetna Insurance Co., defendant, on the part of plaintiff.

John W. Heryford, of lawful age, being produced, sworn, and examined on the part of the plaintiff, deposeth and saith:

At the time the plaintiff left here he gave me his bank-book, and requested me to attend to his affairs until I should hear from him. A few days afterwards I heard of the burning of his house. [I think some time during the day I heard of the burning. I stepped into the banking-house of Thomson & Dunnica, and told Mr. Ja's S. Thomson that from the best information I could gather, that I believed the house was fired by the negroes,] and that we should expect the insurance on the dwelling of W'm Heryford. He told me he would write to the company in Saint Louis and have the matter investigated. I know, of my
27 personal knowledge, that W'm Heryford was the owner of the house. I was out at the farm of plaintiff in a few days after I heard of the burning, and know that the dwelling-house was burned.

Cross-examined.

[My reason for believing the house was burned by the negroes was from the information I received from Mr. Jordan Bently, Mr. Heryford and Mrs. Hite; and also from an interview I had with Col. Kutzner, who assured me he gave no such orders as to burn the house to any of his men.] I continued to act as agent for the plaintiff during his absence, which was nearly a year, I think. I ceased to act as agent for him about the month of September, '65.

Re-examined by plaintiff.

Some time after the investigation had by the agent of the Aetna Insurance Co., I received a letter from the plaintiff, in which he gave me instructions to turn over the policy to Messrs. Shackelford & Adams, att'ys, Saint Louis, for settlement, which instructions were complied with by me.

(Signed) JOHN W. HERYFORD.

Subscribed and sworn to before me on the 3d day of June, 1866, at the place and within the hours first above named.

(Signed) THOMAS W. MOREHEAD, *J. P.*

I, Thomas W. Morehead, a justice of the peace within and for the county of Howard, in the State of Missouri, do certify that in pursuance of agreement between plaintiff & defendant, came before me at the office of Thomas Shackelford, in the county and State last aforesaid, John W. Heryford, who was by me sworn to testify the whole truth of

his knowledge touching the matter in controversy aforesaid; that he was examined, and his examination reduced to writing, and sub-
28 scribed by him in my presence on the day, between the hours, and at the place in that behalf first aforesaid; and his deposition is now herewith returned. And I further certify that said John W. Heryford is a resident of said county of Howard, in State of Missouri.

Given at Glasgow, in the county of Howard, and State of Missouri, this 3d day of June, 1866.

(Signed) THO'S W. MOREHEAD, *J. P.*

And upon the hearing of said application for removal as aforesaid, the court overruled said application and refused to grant the same, and sustained the motion of the plaintiff, to which ruling of the court the defendant objected, and at the time saved his exception to the opinion of the court in overruling said application, and now here files this his bill of exceptions, which are signed and sealed & made a part of the record.

(Signed) G. H. BURCKHARTT. [SEAL.]

And afterwards, on the 7th day of Dec., 1865, the following proceedings were had in said cause:

WILLIAM HERYFORD, PLAINTIFF,
vs.
THE AETNA INSURANCE COMPANY, D'F'T. } Civ. act.

Now, at this day, comes the plaintiff, by his attorney, and the defendant, although solemnly called, comes not, but makes default.

It is therefore considered by the court that judgment by default be entered against the defendant, which judgment by default is set aside by agreement, and this cause is continued.

29 Afterwards, to wit, on the 8th Dec., 1865, the following answer was filed in the office of the clerk of said court, in vacation, to wit:

Answer.

In the circuit court of Howard County.

WILLIAM HERYFORD, PLAINTIFF,
vs.
THE AETNA INSURANCE COMPANY.

The said defendant, for answer to said petition, states that it is true that said defendant executed the policy of insurance in said petition mentioned, for the terms of which defendant begs leave to refer when it shall be produced; and that the said insured premises was destroyed by fire, but the exact time when it was so destroyed or the value thereof, said defendant has not knowledge or information sufficient to form a belief; and defendant denies that said loss and damage did not happen or take place by means of any invasion, insurrection, or civil commotion, or of any military or usurped power, as in said petition alleged, or that he made out due proof of his loss and damage, or that he has fully complied with and performed all the conditions and stipulations on his part to be performed.

Said defendant states that said building was set on fire by and through the acts of military power and of soldiers, and controlled by military power, and did arise and take place by means of insurrection and civil commotion, and by means of, and by and through military power, and said defendant is not in any manner, under the terms of said policy, liable therefor.

STATE OF MISSOURI, *County of St. Louis:*

30 Edward Morrison, agent in this behalf of defendant, being duly sworn, on his oath states that said answer & the matter & things as therein stated he believes to be true.

(Signed) EDW'D MORRISON.

Sworn to and subscribed before me this 2d day of December, 1865.

Witness my hand and notarial seal, at St. Louis, the date last aforesaid.

[L. S.] (Signed) S. W. EAGER, JR.,
Notary Public, St. Louis County, Missouri.

And afterwards, on the 5th day of June, 1866, the following proceedings were had, to wit:

Order filing motion to strike out part of def't's ans.

WILLIAM HERYFORD, PLAINTIFF,
vs.
THE AETNA INSURANCE COMPANY. } Civ. act.

Now, at this day, comes the plaintiff, by his attorney, and files his motion to strike out all that portion of the defendant's answer setting up the mode and manner in which plaintiff's loss occurred, and the mode and manner in which the fire happened that burned the plaintiff's house.

Which said motion is in the following words and figures, to wit:

Motion to strike out pt. depo.

In the Howard circuit court.—June term, 1866.

WILLIAM HERYFORD, PLAINTIFF,
against
THE AETNA INSURANCE COMPANY, DEFENDANT.

31 The plaintiff moves the court to strike out all those parts of the defendant's answer setting up the mode and manner in which plaintiff's loss occurred, and the mode and manner in which the fire happened that burned the plaintiff's house—

1st. Because the said parts of said answer sets up inconsistent defences.

2nd. Because the supposed defences, set in said parts of said answer, are multifarious and alternately stated, and are wholly inconsistent with themselves and with the balance of said answer.

3d. Because said parts of said answer are otherwise defective, vague, and uncertain.

(Signed) ADAMS & SHACKELFORD,
Att'ys for Pl'ffs.

And afterwards, to wit, on the 7th day of June, 1866, the following proceedings were had, to wit:

Order sust'ng motion to strike out p't of def't's answer.

WILLIAM HERYFORD, PLAINTIFF,
vs.
THE AETNA INSURANCE COMPANY. } Civ. act.

The motion, heretotore filed by the plaintiff, to strike out part of defendant's answer having been seen and heard by the court, the same is sustained, and leave is granted defendant to file amended answer; and the defendant excepts to the ruling of the court in striking out part of said answer.

And afterwards, on the same day, the following proceedings were had, to wit:

Order when amended ans. be filed

WILLIAM HERYFORD, PLAINTIFF,
vs.
THE AETNA INSURANCE COMPANY. } Civ. act.

32 In this cause the amended answer of the defendant is to be filed 90 days before the next term of this court, a copy of which is to be furnished the counsel of plaintiff; and this cause is continued on the application of the plaintiff.

And afterwards, to wit, on the 6th day of Dec'r, 1866, the following order was made, to wit:

Order filing motion to strike out p't of depo. of J. W. Heryford.

WILLIAM HERYFORD, PLAINTIFF,
vs.
THE AETNA INSURANCE COMPANY. } Civ. act.

Now, at this day, comes the defendant by his attorney, and files his motion to strike out part of the deposition of Jno. W. Heryford, marked in brackets, thus [ ].

Which motion is in the following words and figures, to wit:

Motion to strike out p't of depo. of J. W. Heryford.

In the circuit court of Howard County.—December term, 1866.

WILLIAM HERYFORD, PLAINTIFF,
vs.
THE AETNA INSURANCE COMPANY. }

And now, at this day, the defendant comes and moves the court to strike out all those parts of the deposition of John W. Heryford included within brackets, marked thus [ ], because said parts of said deposition are illegal, impertinent, and irrelevant, hearsay, and not evidence of any facts p't in issue.

(Signed) HAYDEN & PREWITT,
Att'ys for Def't.

Copy of amended answer filed on the 14th Sept., 1866:

Amended answer.

In the circuit court of Howard County, State of Missouri.

WILLIAM HERYFORD, PLAINTIFF, vs. THE AETNA INSURANCE COMPANY. } Amended answer.

33 The defendant, by way of amendment to the answer originally filed herein, states and admits that the defendants made, executed, and delivered to the plaintiff, at the time and upon the terms and conditions as stated in the petition, the contract or policy of insurance sued on. Defendant admits that the contract or policy of insurance was burnt and destroyed by fire at or about the time stated in the petition, but denies that defendant is liable to make good the loss sustained by the plaintiff by reason of the destruction of said property by fire.

The defendant, further answering, states that it is provided in and by said contract or policy of insurance that defendant should not be made liable, or be liable to make good to the plaintiff any loss or damage by fire to said property that might happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, or any loss by theft at or after such fire. And the defendant denies that it is true, as charged and alleged in and by said petition, that said property, insured as aforesaid, & destroyed and consumed by fire, was not consumed and destroyed by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, for defendant avers, and states the fact to be, that said property was consumed and destroyed by fire, which fire happened and took place by means of a riot, & by means of military power; that is to say, at or about the time of the destruction of said property by fire, certain persons, soldiers, under the military authority of the United States, & certain other evil-disposed persons, three or more in number, met

34 and assembled together on the farm and at the house, the property of plaintiff, and being then and there so assembled together, unlawfully and riotously, and with force and violence, to injure the property of plaintiff, set said property on fire, by means whereof said property was wholly consumed and destroyed. The defendant denies that the plaintiff performed on his part all the conditions contained in said policy of insurance to be performed by him.

Defendant, further answering, states and avers that defendant does not know, nor has defendant any knowledge or information sufficient from which to form a belief, whether said property was, at the time it was destroyed by fire, worth or was of the value of thirty-five hundred dollars. Defendant denies that plaintiff is entitled to a judgment against defendant for the sum of twenty-five hundred dollars & interest, or to a judgment for any other sum by reason of anything stated by him in his said petition.

(Signed) HAYDEN & PREWITT,
Att'ys for Def't.

W. Henry Holland, agent for defendant, makes oath and says the above answer & matters therein as stated he believes to be true.

(Signed) W. HENRY HOLLAND.

Sworn to and subscribed before me this eleventh day of August, A. D. 1866.

[SEAL.] (Signed) JOHN. N. GIBBONS,
Notary Public, St. Louis Co., Missouri.

And afterwards, on the 6th day of December, 1866, the following proceedings were had:

35 *Judgment.*

WILLIAM HERYFORD, PLAINTIFF,
vs.
THE AETNA INSURANCE COMPANY. } Civ. act.

Now, at this day, come the parties aforesaid, by their attorneys, whereupon come also the following jury, to wit, John M. Kivett, Henry B. Miller, Joseph H. Pulliam, B. A. Sandridge, Joseph Wilhirt, Joseph Hockensmith, John R. Hitt, Sidney P. Alverson, Robert W. Baskett, William W. Ketchum, Elisha P. Kerby, and Morgan A. Taylor, twelve good and lawful men, of the body of the county of Howard, who, after being elected, tried, and sworn, and after hearing all the evidence in the cause and the instruction of the court, upon their oaths do say:

"We, the jury, find for the plaintiff twenty-seven hundred and eighty-seven dollars and fifty cents."

It is therefore considered by the court that the said plaintiff recover of the said defendant the said sum of twenty-seven hundred and eighty-seven dollars, so by the jury found to be due, together with his costs and charges in this behalf expended, and that he have thereof execution. Int. 6 per c't.

And afterwards, on the same day, the following proceedings were had, to wit:

Order filing motion for a new trial.

WILLIAM HERYFORD, PLAINTIFF,
vs.
THE AETNA INSURANCE COMPANY. } Civ. act.

Now, at this day, comes the defendant, by his attorney, and files his motion for a new trial in this cause.

36 Which motion is in the following words and figures, to wit:

Motion.

In the circuit court of Howard County.—Dec'r term, 1866.

WILLIAM HERYFORD, PLAINTIFF,
vs.
THE AETNA INSURANCE COMPANY, DEF'T. }

And now, on this day, the defendant comes & moves the court to set aside the verdict rendered by the jury against defendant in the above cause, and to grant defendant a new trial, for the following reasons, to wit:

1st. Because the court refused to give to the jury, at the instance of defendant, legal and proper instructions; &

2nd. Because the court, at the instance of the plaintiff, and against objections of defendant, gave improper and illegal instructions to the jury at the instance of plaintiff.

3rd. Because said instructions, given to the jury at the instance of pl'ff, were and are contrary to law and the evidence given in the case, and were and are wrong & not warranted by the evidence.

4th. Because the verdict of the jury is contrary to law and evidence, and is not warranted by the law and evidence, and is against the weight of evidence.

5th. Because the instructions given by the court as aforesaid were and erroneous, contrary to law and evidence, and misled the jury.

6th. That the verdict of the jury, upon the law & evidence, ought to have been for defendant.

(Signed) HAYDEN & PREWITT,
Att'ys for Def't.

37 And afterwards, on the 7th day of June, 1866, the following order was made:

Order overruling motion for new trial.

WILLIAM HERYFORD, PLAINTIFF,
vs.
THE AETNA INSURANCE COMPANY. } Civ. act.

Now, at this day, come the parties aforesaid, by their attorneys, and the motion heretofore filed in this cause for a new trial having been seen and heard by the court, and by the court fully understood, is overruled.

And afterwards, on the 8th Dec'r, 1866, the following order was made, to wit:

Order filing bill of exceptions.

WILLIAM HERYFORD, PLAINTIFF,
vs.
THE AETNA INSURANCE COMPANY. } Civ. act.

Now, at this day, comes the defendant, by its attorney, and file their bill of exceptions, which is signed and sealed by the court, and made a part of the record in this cause.

And afterwards, to wit, on the 10th Dec'r, 1866, the following proceedings were had, to wit:

WILLIAM HERYFORD, PLAINTIFF,
vs.
THE AETNA INSURANCE COMPANY. } Civ. act.

Now, at this day, comes the defendant, by its attorney, and files affidavit and appeal bond in this cause, and thereupon the court grants an appeal to the court of appeals of this district.

38 Which affidavit and bond are in the following words and figures, to wit:

Affidavit.

In the circuit court of Howard County, State of Missouri.—Dec'r term, 1866.

WILLIAM HERYFORD, PLAINTIFF,
vs.
THE AETNA INSURANCE COMPANY.

The undersigned affiant, agent for defendant, prays an appeal from the judgment of this court rendered in said cause, to the court of appeals of this district, and makes oath and says that said appeal is not made for vexation or delay, but because this affiant believes that the appellant is aggrieved by the judgment or decision of this court.

(Signed) EMMETT R. HAYDEN,
Agent for Defendant.

Subscribed & sworn to in open court this 8th of December, 1866.
(Signed) C. H. STEWART, *Cl'k.*

Bond.

Know all men by these presents that we, James S. Thomson, as principal, and William F. Dunnica and James W. Lewis, as his securities, are held and firmly bound to William Heryford in the sum of six thousand five hundred dollars; for the payment of which, we bind ourselves, our heirs, executors, and administrators, firmly by these presents, signed and sealed this 10th day of December, 1866,

The condition of this obligation is such, that whereas the Aetna Insurance Company has this day taken an appeal to the district court of the fourth district, from the judgment of the circuit court of How-
39 ard County, rendered at this term in favor of said William Heryford, and against said Aetna Insurance Company:

Now, if the said appellant shall prosecute its appeal with due diligence to a decision in the said district court, and shall perform such judgment as shall be given by the said court, or such as said court may direct the circuit court to give, and if the judgment of such court, or any part thereof, be affirmed, and the said appellant shall comply with and perform the same, as far as it may be affirmed, and shall pay all damages and costs which may be awarded against the appellant by said district court, then this obligation to be void; otherwise to remain valid in law.

(Signed) J. S. THOMSON. [SEAL.]
" W. F. DUNNICA. [SEAL.]
" JA'S W. LEWIS. [SEAL.]

And afterwards, to wit, on the 18th day of April, 1868, the following mandate of the supreme court was filed in this cause, to wit:

Mandate.

Supreme court of Missouri.—January term, 1868.

WILLIAM HERYFORD, APPELLANT,
vs.
THE AETNA INSURANCE COMPANY,
Respondent.
} Appeal from the fourth district court.

Now, at this day, come again the parties aforesaid, by their respective

attorneys, and the court here being now sufficiently advised of and concerning the premises, do consider and adjudge that the judgment aforesaid, in form aforesaid by the said district court rendered, be in all things affirmed, and stand in full force and effect.

40 It is further considered and adjudged by the court, that the said cause be remanded to the circuit court of Howard County, for further proceedings to be had therein, in conformity with the opinion of this court herein delivered, and that the said respondent recover against the said appellant his costs and charges herein expended, and have therefor execution.

STATE OF MISSOURI, *ss:*

I, N. C. Burch, clerk of the supreme court of the State aforesaid, certify that the foregoing is a full, true, and complete transcript of the judgment of the said supreme court, entered of record at the January term, 1868, in the above-entitled cause.

Given under my hand and the seal of the supreme court, at office in the city of Jefferson, this 13th day of March, 1868.

[L. S.] (Signed) N. C. BURCH, *Clerk.*

And afterwards, to wit, on the 3d day of June, 1868, the following proceedings were had in said cause, to wit:

Order to remove.

WILLIAM HERYFORD, PLAINTIFF,
vs.
THE AETNA INSURANCE COMPANY, DEFENDANT.

This cause having been reversed and remanded, with direction to sustain the application of the defendant for removal of the same to the circuit court of the United States at St. Louis; now, therefore, in compliance with said directions, the application for removal is hereby

41 sustained, and this cause is ordered to be certified and transmitted, with the original papers not forming a part of the record, to said United States circuit court.

Clerk's certificate.

STATE OF MISSOURI, *County of Howard, sct:*

I, Charles H. Stewart, clerk of the circuit court in and for said county, do hereby certify that the foregoing is a true and correct transcript of the record and proceedings had in the above entitled cause, as fully as the same now remain of record and on file in my office. I further certify that I have transmitted to the United States district court at Saint Louis, the original depositions and policy of insurance filed in said cause.

Given under my hand and the seal of said court at office at Fayette, this 8th July, 1868.

[L. S.] (Signed) C. H. STEWART, *Clk.*

[U. S. int. rev., 5 cents.]

And afterwards, at a regular stated term of said U. S. circuit court, begun and held in the city of St. Louis, at the October term thereof, 1868, on Thursday, the 8th day of October, in the year aforesaid, the following proceedings took place in this case, to wit:

Order filing declaration.

WILLIAM HERYFORD, PLAINTIFF, } Removed from Howard County circuit
ag'st } court
THE AETNA INSURANCE COMPANY, DEFENDANT. }

This day comes the plaintiff, by attorney and files his declaration herein, in accordance with the rules and practice of this court; to
42 which said declaration the said defendant files its plea of not guilty herein.

Which declaration is in the words and figures following, to wit:

Declaration.

In the circuit court of the United States for the district of Missouri.—Oct. term, 1868.

WILLIAM HERYFORD }
vs. }
AETNA INSURANCE CO. }

UNITED STATES OF AMERICA,
Districts of Missouri, ss:

And now comes the above-named plaintiff, a citizen of the State of Missouri, by his attorneys, Cline, Jamison & Day, and by leave of court files this amended pleading and complains of the said defendant, a corporation of the State of Connecticut, in a plea of trespass on the case on promises.

For that whereas the defendant heretofore, to wit, on the 20th day of February, 1864, at the district aforesaid, by its policy of insurance numbered 119, and now here to the court shown, in consideration of twenty-five dollars paid by plaintiff to defendant, did make insurance and cause to be insured the said plaintiff against loss or damage by fire, for the term of one year from said 20th day of February, 1864, to the 20th day of February 1865, at noon, to the amount of twenty-five hundred dollars, on his two-story frame dwelling-house, situated in Chariton County, Missouri, situated on S. E. q'r of section 10, township 52, range 17, occupied by the said William Heryford as a dwelling.

That, in consideration of the sum of money paid by the plaintiff to said defendant as aforesaid, said defendant promised and agreed, then and there with plaintiff, to make good unto the plaintiff, his executors, administrators, and assigns, all such immediate loss or damage,
43 not exceeding in amount the sum insured, as should happen by fire to the said property, as above specified, from said 20th day of February, 1864, (at 12 o'clock at noon,) unto the 20th day of February, 1865, (at 12 o'clock at noon,) the said loss or damage to be estimated according to the true and actual cash value of the property at the time the said loss should happen, and to be paid within sixty days after notice and proof thereof, made by the said plaintiff in conformity to the conditions annexed to said policy.

It was, however, provided in said policy of insurance, that said company should not be liable to make good any loss or damage by fire, which might happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, or by any loss by theft at or after a fire, or for damage to property by lightning, aside from fire, or for damage occasioned by the explosion of a steam-

boiler, or from damage by fire resulting from such explosion, or for damage arising from explosions caused by gunpowder, gas, or other explosive substance, nor for damage occasioned by the use of camphene & spirit gas, or burning-fluid, unless otherwise expressly provided.

And it was agreed and understood to be the true intent and meaning of the parties to said policy of insurance that in case the property above mentioned should at any time after the making, and during the continuance, of said insurance, be appropriated, applied or used to or for the purpose of carrying on or exercising therein any trade, business, or vocation denominated hazardous, extra-hazardous, or included in the enumeration of special rates in the conditions annexed to said policy, or for the purpose of storing or vending therein any of the articles, goods, or merchandise, in the condi aforesaid denomin-
44 ated hazardous, extra-hazardous, or included in the memorandum of special rates in the conditions annexed to said policy, unless in said policy otherwise specially provided for, or thereafter agreed by said company in writing, and added to and endorsed upon said policy, then and from thenceforth so long as the said property should be so appropriated, applied, or used, said policy should cease and be of no force or effect.

And it was further provided in said policy that said defendant should not be answerable for any loss arising from the use of fires in buildings unprovided with a good and substantial stone or brick chimney, or in consequence of neglect or deviation from the laws or regulations of police made to prevent accidents from fires in places where laws and regulations on said subjects exist.

It was also expressly agreed between the parties to said policy that said insured, in case of sustaining loss or damage by fire, should forthwith give notice thereof to the defendant, or its agents, and as soon after as possible deliver in a particular account of such loss or damage, signed by his hand, verified by his oath or affirmation. That he should also declare on oath whether any and what other insurance had been made on said property, what was the whole value of the property insured, what was his interest therein; in what general manner (as to trade, manufactory, merchandise, or otherwise) the building insured or containing the subject insured, and the several parts thereof, were occupied at the time of the loss, and who were the occupants of said property, and when and how the fire originated so far as he, said plaintiff, might know or believe, and should procure a certificate under
45 the hand of a magistrate or notary public (most contiguous to the place of the fire, and not concerned in the loss as a creditor or otherwise, or related to the insured or sufferers) that he is acquainted with the character and circumstances of the insured, and has made diligent inquiry into the facts set forth in his statement, and knows or verily believes that he really and by misfortune, and without fraud or evil practice, had sustained, by such fire, loss and damage, to the amount in said certificate mentioned. That if required, said insured should produce his books of account and other proper vouchers, and should also, if required, submit to an examination under oath, by the agent or attorney of the company, and answer all questions touching his knowledge of anything relating to such loss or damage, or to his claim thereupon, and subscribe such examination, the same being reduced to writing, and until such proofs, declarations, and certificates should be produced, and examination if required, the loss should not be deemed payable. And in said policy it was further expressly provided that no suit or action against said company for the recovery of any

claim upon, under, or by virtue of said policy, should be sustainable in any court of law or chancery, unless such suit or action should be commenced within the term of twelve months next after any loss or damage should occur. And in said policy it was further provided that in case the said insurance should be on property situated over one mile from the city, town, or village in which the agency was located where said policy was filled and countersigned, it was to be a condition of the insurance in the event of any loss covered by said policy, one-fourth of such
46 loss was to be borne by the assured, and three-fourths by the company, not exceeding the sum insured.

And in said policy it was further stipulated, that, in case of fire, or loss or damage thereby, or of exposure to loss or damage thereby, it should be the duty of the said insured to use all possible diligence in preserving the property.

And in said policy it was further stipulated that in case said insured should have already any other insurance against loss by fire on the property thereby insured, and not notified to said company, and mentioned in or endorsed upon said policy, then said insurance should be of no effect; and that if said insured should thereafter make any other insurance on the said property, and should not with reasonable diligence give notice thereof to said company, and have the same endorsed upon said policy, or otherwise acknowledged by them in writing, then said policy should cease and be of no further effect; and that in case of any other insurance upon the property thereby insured, whether prior or subsequent to the date of said policy, the said insured should not, in case of loss or damage, be entitled to demand or recover of said company any greater portion of the loss or damage sustained than the amount by said policy insured should bear to the whole amount insured on said property.

And by said policy it was further agreed that said insurance was not intended to apply to or cover any books of account, written securities, deeds, or other evidences of title to lands, nor to bonds, bills, notes, or other evidences of debt, nor to money or bullion.

And plaintiff says that while he was the owner of said two-story frame dwelling-house described in said policy, and within the
47 time mentioned in said policy, to wit, on the 7th day of November, A. D. 1864, at said county of Chariton, in said district, the said dwelling was accidentally, and by misfortune, destroyed totally by fire, whereby the plaintiff sustained loss and damage in the sum of thirty-five hundred dollars, which was the actual cash value of said dwelling at the time it was destroyed, as aforesaid. That forthwith after said loss and damage, plaintiff gave notice thereof to the defendant and duly performed all the conditions and stipulations in said policy contained on his part to be done or performed in case of loss or damage, and did as soon as possible after said fire render to defendant a particular account of said loss and damage, in conformity with the stipulations in said policy, and in all things has performed and fulfilled his part of said contract of insurance as set forth in said policy and the conditions thereto annexed. That said loss or damage, or any portion thereof, did not happen by means of any of the excepted causes enumerated in said policy, and hereinbefore mentioned. And whereas it was provided in said policy of insurance that said loss and damage should be paid in sixty days after the loss should be ascertained and proved; and whereas proof of said loss or damage was made by said insured, in conformity with the requirements and stipulations of said policy, on or about the day of November, 1864; and although sixty

days after the making and delivery of said notice and proof of loss have elapsed, and had elapsed prior to the bringing of this suit; and although the plaintiff has duly performed and fulfilled all the stipulations and agreements in said policy contained on his part to be performed, yet said defendant, although thereto often requested by plaintiff on
48 said day of Nov., 1864, as well as at other times, has failed and refused and does refuse to pay to plaintiff said sum of twenty-five hundred dollars, or any part thereof, to plaintiff's damage in the sum of three thousand dollars. And therefore plaintiff brings this suit, &c.

(Signed) CLINE, JAMISON & DAY,
Att'ys for Plaintiff.

And the plea filed by defendants, as aforesaid, is in the words and figures following, to wit:

Plea.

In the circuit court of the United States for the districts of Missouri.

WILLIAM HERYFORD
against
THE AETNA INSURANCE COMPANY.

DISTRICTS OF MISSOURI, *sct:*

And now comes the said defendant and defends the wrong and injury, when, &c., and says that it did not undertake and promise in manner and form as said plaintiff hath above thereof complained against the said plaintiff; and of this said defendant puts itself upon the country, &c.

(Signed) GLOVER & SHEPLEY,
Att'ys for Def't.

And afterwards, at said term of said United States circuit court, begun and held as aforesaid, on Wednesday, the 14th day of October, A. D. 1868, the following further proceedings took place in this case, to wit:

Order continuing case until the next term of court.

WILLIAM HERYFORD, PLAINTIFF,
ag'st
THE AETNA INSURANCE COMPANY, DEFENDANT.
} Removed from Howard County circuit court.

Order that this case be now continued until the next term of this court.

And afterwards, at the next stated term of said U. S. circuit
49 court, begun and held as aforesaid, at the April term thereof, 1869, on Tuesday, the 13th day of April, in the year aforesaid, the following further proceedings took place in this case, to wit:

Order summoning a jury.

WILLIAM HERYFORD, PLAINTIFF,
ag'st
AETNA INSURANCE COMPANY, DEFENDANT.
} Removed from circuit court of Howard County.

This day come the parties, by attorneys, and this cause being regularly called on for trial, and both parties being ready, it is ordered that a jury come. Thereupon come a jury, to wit, William Sheievelbein,

Sinclair K. Miller, Fred'k A. Wolf, W'm P. Fenn, George Rothweiler, John L. Jones, W. W. Letton, Henry Margraff, John W. Hatfield, John Angel, James R. Ranson, and Richard E. Hays, twelve good and lawful men, who were sworn well and truly to try the issues joined herein; and it being now at the hour of adjournment, it is ordered that further proceedings herein be continued until the meeting of the court on to-morrow morning.

And afterwards, at said term of said U. S. circuit court, begun and held as aforesaid, on Wednesday, the 14th day of April, A. D. 1869, the following further proceedings took place in this case, to wit:

Judgment.

WILLIAM HERYFORD, PLAINTIFF, *ag'st* THE AETNA INSURANCE COMPANY, DEFENDANT, } Removed from circuit court of Howard County.

This day again come the parties herein, by attorneys, and the jury sworn in this cause being also present, thereupon the trial of this
50 case progressed. The testimony and arguments of counsel having been heard and concluded, the said jury, after receiving instructions from the court, retired to consider of their verdict to be rendered in this case, and afterwards returned into court the following verdict, to wit:

"We, the jury, find for the plaintiff, and assess the damages at three thousand and fifty dollars.

"NINIAN W. LETTON, *Foreman.*"

It is therefore now considered by the court that the plaintiff recover against the defendant, the Aetna Insurance Company of Hartford, Connecticut, the sum of ($3,050 00) three thousand and fifty dollars, the damages so as aforesaid by the jury assessed, and also the costs in this behalf expended, and that execution be issued therefor.

And afterwards, at said term of said U. S. circuit court, begun and held as aforesaid, on Friday, the 16th day of April, A. D. 1869, the following further proceedings took place in this case, to wit:

Motion for new trial filed.

WILLIAM HEREFORD, PLAINTIFF, *ag'st* THE AETNA INSURANCE COMPANY, DEFENDANT. } Assumpsit.

This day comes the defendant, by attorney, and files motion for a new trial herein for the reasons set forth in said motion.

Which motion for a new trial is in the words and figures following, to wit:

Motion for a new trial.

In the circuit court of the United States for the districts of Missouri, ss:

WILLIAM HEREFORD *vs.* THE AETNA INSURANCE COMPANY. }

51 And now comes the said defendant and moves the court to set

aside the verdict and judgment rendered in the above-entitled cause, and grant a new trial, for the following reasons, to wit:

1st. That the court misdirected the jury in matter of law applicable to the case.

2d. Because the court gave improper and illegal instructions to the jury.

3d. Because the verdict was against law & evidence.

(Signed) GLOVER & SHEPLEY, EATON,
For Def'ts.

And afterwards, at said term of said U. S. circuit court, begun and held as aforesaid on Saturday, the 15th day of May, A. D. 1869, the following further proceedings took place in this case, to wit:

Motion for a new trial overruled.

WILLIAM HERYFORD, PLAINTIFF, *ag'st* AETNA INSURANCE COMPANY, DEFENDANT. } Removed from circuit court of Howard County.

This day come the parties, by attorneys, and the attorney for defendant filed a motion to set aside the finding by the court in this case and for a new trial herein upon the grounds and for the reasons set forth in said motion; and the court having examined the same, and being advised in the premises, now orders that said motion be, and the same is hereby, overruled.

And afterwards, at said term of said U. S. circuit court, begun and held as aforesaid on Monday, the 17th day of May, A. D. 1869, the following further proceedings took place in this case, to wit:

Order filing bill of exceptions.

WILLIAM HERYFORD, PLAINTIFF, *ag'st* THE AETNA INSURANCE COMPANY, DEFENDANT. } Removed from circuit court of Howard County.

52 This day comes the defendant, by attorney, and files a bill of exceptions in this case; which, being examined and approved, is signed, sealed, and ordered to be made a part of the record in this case. Which bill of exceptions is in the words and figures following, to wit:

Bill of exceptions.

WILLIAM HERYFORD *vs.* THE AETNA INS. CO. } Bill of exceptions.

Be it remembered that at the trial of this cause the following proceedings were had, to wit:

The plaintiff read in evidence the policy of insurance as follows, to wit:

Policy of insurance.

No. 119. Aetna Insurance Company of Hartford, Connecticut. $2,500.

[U. S. int. rev., 25 cents.]

By this policy of insurance the Aetna Insurance Company in con-

sideration of twenty-five dollars to them paid by the assured, hereinafter named, the receipt whereof is hereby acknowledged, do insure William Heryford, of Chariton County, Mo., against loss or damage by fire to the amount of twenty-five hundred dollars, for the term of one year from 20th day of February, 1864, to the 20th day of February, 1865, at noon, on his two-story frame dwelling-house, situated in Chariton County, Missouri, situated on S. E. q'r of section 10, township 52, range 17, occupied by the said W'm Heryford, as a dwelling—

$2,500, @ 1..... 25 00

From the 20th day of February, 1864, to 20th February, 1865.

And the said company do hereby promise and agree to make good unto the said assured, his executors, administrators, and assigns, all such immediate loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property as above specified, from the
53 20th day of February, one thousand eight hundred and sixty-four, (at 12 o'clock at noon,) unto the 20th day of February, one thousand eight hundred and sixty-five, (at 12 o'clock at noon,) the said loss or damage to be estimated according to the true and actual cash value of the property at the time the same shall happen, and to be paid within sixty days after notice and proof thereof made by the assured, in conformity to the conditions annexed to this policy; provided, always, and it is hereby declared, that this company shall not be liable to make good any loss or damage by fire which may happen to take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, or any loss by theft at or after a fire; and provided further, that in case the assured shall have already any other insurance against loss by fire on the property hereby insured, and not notified to this company, and mentioned in or endorsed upon this policy, then this insurance shall be void and of no effect. And if the said assured or assigns shall hereafter make any other insurance on the same property, and shall not, with all reasonable diligence, give notice thereof to this company, and have the same endorsed upon this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect. And in case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the assured shall not, in case of loss or damage, be entitled to demand or recover of this company any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on the said property.

And it is agreed and declared to be the true intent and meaning of the parties hereto, that in case the above-mentioned property
54 shall at any time after the making and during the continuance of this insurance be appropriated, applied, or used to or for the purpose of carrying on or exercising therein any trade, business, or vocation denominated hazardous, extra-hazardous, or included in the memorandum of special rates, in the conditions annexed to this policy, or for the purpose of storing or vending therein any of the articles, goods, or merchandise in the conditions aforesaid, denominated hazardous, extra-hazardous, or included in the memorandum of special rates, unless herein otherwise specially provided for, or hereafter agreed by this company in writing, and added to or endorsed upon this policy, then, and from thenceforth, so long as the same shall be so appropriated, applied, or used, these presents shall cease and be of no force or effect.

And it is moreover declared that this insurance is not intended to apply to or cover any books of accounts, written securities, deeds, or other evidences of title to lands, nor to bonds, bills, notes, or other evidences of debt, nor to money or bullion; and that this policy is made and accepted in reference to the conditions hereto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for.

This policy shall not be valid until countersigned by the duly authorized agent of said Aetna Insurance Company at Glasgow, Mo.

In witness whereof the Aetna Insurance Co. have caused these presents to be signed by their president, and attested by their secretary, in the city of Hartford, and State of Connecticut.

E. G. RIPLEY, *President.*

THO. K. BRACE, *Jr., Secretary.*

Countersigned at Glasgow this 20 day of February, A. D. 1864.

J. S. THOMSON, *Agent.*

55 *Conditions of insurance referred to in the body of the foregoing policy.*

1. Goods not hazardous are such as are usually kept in dry goods stores, including coffee, flour, household furniture and linen, indigo, rice, spices, sugars, teas, and other articles not combustible.

2. The following trades and occupations, goods, wares, and merchandise are denominated hazardous, viz: Alcohol, basket-sellers, brush-makers' stock, cabinet furniture, china, earthen, or glass ware, or plate glass in boxes, crates, or casks, copper-plate printers, cotton in bales, hat-finishers, (without use of fire, except for heating their irons,) hardware and cutlery, jewelers' stock, liquor in glass unpacked, looking-glasses in boxes, manilla grass in bales, paints ground in oil, paper-hanging, porter-houses, potash, pocket-book makers' stock, printers of newspapers, rags in packages, sail-makers, ship-chandlers, spirituous liquors, cigar-makers, stationers' stock, snuff-makers, threshed grain, tin or sheet-iron workers, victualling-houses, watch-makers' stock and tools, wine in glass in packages, window or plate glass in packages.

3. The following trades and occupations, goods, wares, and merchandise are denominated extra-hazardous, viz: Basket-makers, straw-bleachers, booksellers' stocks, blacksmiths, boat-builders, brass-founders, china, earthen, or glass ware, or looking glasses unpacked, confectioners' stock, cotton unpacked, coopers, coppersmiths, druggists and apothecaries, fur-dressers, flax in bales, fringe-makers, gun-makers or smiths, grate-makers, hay pressed in bundles, hemp in bales, ink-makers, lamp manufacturers, lamp-sellers' stock, lithographers, milliners' stock,
56 morocco manufacturers, optical and mathematical instrument makers, painters' stock, perfumers, phosporus, pictures and prints, printers of books and jobbing, plate or plated-ware manufactories, pocket-book makers, plumbers and pewterers, saltpetre, silversmiths, stables, (private,) spirits of turpentine, stove manufactories, tobacco manufacturers, toy-keepers' stock, type or stereotype manufacturers, varnish, window, and plate glass unpacked.

MEM.—Bakers, bark-mills, blind-makers, breweries, bookbinders, blacksmiths, boat-builders, cabinet-makers, carpenters, joiners, chair or coach makers' workshops, chemists, cotton-mills, dyers, forges, fences, frame-makers, furriers, fulling-mills, grist-mills, hat manufactories,

houses, building or repairing, ink or ivory-black or lamp-black manufactories, livery-stables, lumber or mahogany yards, malt-house, metal and other mills of all kinds, musical-instrument makers, oil-makers, pump and block makers' shops, paper-mills, rope-makers, saw-mills, ship builders' stock in the yard, ships or other vessels in port, or their cargoes, or when building or repairing, steam-engines or boats, tanneries, tallow melters and chandlers, timber-yards, woolen mills, and generally all manufacturing establishments, and all trades requiring the use of fire, heat, or steam-power, not before enumerated, will be insured at special rates of premium.

☞The following are not to be insured at any rate of premium, viz: Brimstone works, distilleries, flax-mills, gunpowder, oil-boiling houses, oakum factories, panoramas or other scenic paintings, patent-leather manufactories, sash and blind factories, snuff-mills, steam planing-mills, tar-boiling houses, theatres, turpentine manufactories, varnish-makers, steam saw-mills, sugar refineries, and India-rubber factories.

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4. Applications for insurance must specify the construction and materials of the building to be insured, or containing the property to be insured; by whom occupied; whether as a private dwelling, or how otherwise; its situation, with respect to contiguous buildings, and their construction and materials; whether any manufactory is carried on within or about it; and in case of goods and merchandise, whether or not they are of the description denominated hazardous, extra-hazardous, or included in the memorandum of special rates. And a false description by the assured, of a building or of its contents, or the omission to make known any fact material to the risk, or, in a valued policy, an over-valuation, shall render absolutely void a policy issued upon such description or valuation. But the office will be responsible for the accuracy of surveys and valuations made by its agents. If, after insurance is effected either by the original policy or by the renewal thereof, the risk be increased by any means within the control of the assured, or if such building or premises shall be, with the assent of the assured, occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of no effect. If, during this insurance, any subsequent insurance should be made upon the property hereby insured, which, with the sum or sums already insured, should, in the opinion of the said Aetna Insurance Company, amount to an over-insurance, or the risk be increased by the erection of buildings or by the use or occupation of neighboring premises, or otherwise, or if for any other cause the company shall so elect, it shall be optional with the company to cancel this policy, after notice given to the assured or his representative of their intention to do so; in which case the company will refund the premium for the unexpired time.

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5. No insurance, whether original or continued, shall be considered as binding until the actual payment of the premium.

6. Goods held in trust, or on commission, are to be insured as such, otherwise the policy will not cover such property; and in case of loss, the names of the respective owners shall be set forth in the preliminary proofs of such loss, together with their respective interests therein. Goods on storage must be separately and specifically insured. If the interest or property insured be leasehold, or that of mortgage, or any other interest not absolute, such must be made known to this company, and expressed in the policy.

7. Policies of insurance subscribed by this company shall not be assignable without the consent of the company, expressed by endorsement

made thereon. In case of assignment without such consent, whether of the whole policy or any interest in it, the liability of the company, in virtue of such policy, shall thenceforth cease. And, in case of any transfer or change of title in the property insured by this company, or any undivided interest therein, such insurance shall be void and cease.

8. This company will not be liable for damage to property by lightning aside from fire; nor for any damage occasioned by the explosion of a steam-boiler; nor for damage by fire, resulting from such explosion; nor explosions caused by gunpowder, gas, or other explosive substances; nor for damage occasioned by the use of camphene, spirit-gas, or burning-fluid, unless otherwise expressly provided. The keeping of gunpowder for sale or on storage upon or in the premises insured, without written permission in the policy, shall render it void.

9. Jewels, watches, plate, medals, musical instruments, paintings, statuary, sculptures, and curiosities are not deemed to be included in any insurance, unless an inventory thereof accompany the application for insurance, or is inserted in the policy.

10. In case of fire, or loss or damage thereby, or of exposure to loss or damage thereby, it shall be the duty of the insured to use all possible diligence in saving and preserving the property. And, if they shall fail to do so, this company shall not be held answerable to make good the loss and damage sustained in consequence of such neglect. And it is also mutually understood that there can be no abandonment to the insurers of the subject insured.

11. All persons insured by this company, and sustaining loss or damage by fire, are forthwith to give notice thereof the company or its agents; and as soon after as possible to deliver in a particular account of such loss or damage, signed with their own hands, and verified by their oath or affirmation; they shall also declare on oath whether any, and what other, insurance has been made on the same property; what was the whole value of the subject insured; what was their interest therein; in what general manner, (as to trade, manufactory, merchandise, or otherwise,) the building insured or containing the subject insured, and the several parts thereof, were occupied at the time of the loss, and who were the occupants of such buildings; and when and how the fire originated, so far as they know or believe; and procure a certificate, under the hand of a magistrate or notary public, (most contiguous to the place of the fire, and not concerned in the loss as a creditor or otherwise, or related to the insured or sufferers,) that he is acquainted with the character and circumstances of the person or persons insured, and has made diligent inquiry into the facts set forth in their statement, and knows, or verily believes, that he, she, or they, really, and by misfortune, and without fraud or evil practice, hath or have sustained, by such fire, loss and damage to the amount therein mentioned; and also, if required, shall produce their books of account and other proper vouchers; and shall also, if required, submit to an examination, under oath, by the agent or attorney of the company, and answer all questions touching his, her, or their knowledge of anything relating to such loss or damage, or to their claim thereupon, and subscribe such examination, the same being reduced to writing; and until such proofs, declarations, and certificates are produced, and examination, if required, the loss shall not be deemed payable. Also, if there appear any fraud or false swearing, the insured shall forfeit all claim under this policy. Damage to buildings, not totally destroyed, shall be appraised by disinterested men, mutually agreed upon by the assured and the office, or

its agents; and where merchandise or other personal property is partially damaged, the insured shall forthwith cause it to be put in as good order as the nature of the case will admit, assorting and arranging the
61 various articles according to their kind; and shall cause a list or inventory of the whole to be made, naming the quantity and cost of each kind. The damage shall then be ascertained by the examination and appraisal of said damage on each article by disinterested appraisers mutually agreed upon, whose detailed report in writing shall form a part of the proofs required to be furnished by the claimant, one-half of the appraisers' fees to be paid by the insurers. A copy of the written portion of the policy to be given in the affidavit of the claimant in all cases. Also copy of all other policies insuring same property, and sharing payment of the same loss with this company. A claim for loss or damage on a policy assigned, where there is no actual sale or transfer of the property insured, proofs of loss shall be made by the assured in conformity with the conditions of this policy, in like manner as if no assignment had been made, otherwise this policy shall be void and of no force or validity whatever, and all liability on the part of this company shall cease. Reinsurance for any other insurance company to be on the basis of joint liability with said company; and in no event will this company be liable for a sum greater than such portion as the sum hereby reinsured bears to the whole sum insured on the property by the company reinsured, and, in case of loss, this company to pay their pro rata proportion at the same time, manner, and form as the company reinsured. Plans and specifications of buildings, machinery, and fixtures, damaged or destroyed, must be furnished free of expense when requested. When an inventory of merchandise or other property, sound or damaged, is to be taken in adjusting a claim for loss or damaged, this com-
62 pany shall have notice, and the appointment of one or more assistants to complete such listing of property when required by its agent.

12. Payment of losses shall be made in sixty days after the loss shall have been ascertained and proved, and, in case differences shall arise touching any loss or damage, it may be submitted to the judgment of arbitrators indifferently chosen, whose award in writing shall be binding on the parties. In case of any loss on, or damage to, the property insured, it shall be optional with the company to replace the articles lost or damaged with others of the same kind and equal goodness, and to rebuild or repair the building or buildings within a reasonable time; giving notice of their intention so to do within thirty days after the preliminary proofs shall have been received at the office of the company.

13. Insurance once made may be continued for such further term as may be agreed on, the premium thereon being paid, and a renewal receipt being given for the same; and it shall be considered as continued under the original representation in so far as it may not be varied by a new representation in writing, which, in all cases, it shall be incumbent on the party insured to make when the risk has been changed either within itself or by the surrounding or adjacent buildings.

14. When a policy is made and issued upon a survey and description of certain property, such survey and description shall be taken and deemed to be a part and portion of such policy and warranty on the part of the assured.

15. Where property insured by this company is damaged by removal from a building, in which it is exposed to loss by fire, said damage
63 shall be borne by the insured and the insurers in such proportion

as the whole sum insured bears to the whole value of the property insured, of which proof in due form shall be made by the claimant.

16. The company will not be answerable for any loss arising from the use of fires in buildings unprovided with a good and substantial stone or brick chimney, or in consequence of neglect or deviation from the laws or regulations of police made to prevent accidents from fires in places where laws and regulations on this subject exist.

17. It is furthermore hereby expressly provided that no suit or action against said company, for the recovery of any claim upon, under, or by virtue of this policy, shall be sustainable in any court of law or chancery unless such suit or action shall be commenced within the term of twelve months next after [after] any loss or damage shall occur; and in case any such suit or action shall be commenced against said company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.

18. In case this insurance shall be on property situated over one mile from the city, town, or village in which the agency is located, where this policy is filled and countersigned, it is to be a condition of the insurance, in the event of any loss covered by this policy, one-fourth of such loss is to be borne by the assured, and three-fourths by this company, (not exceeding the sum insured,) nor, in the event of additional insurance by other companies, on property so situated, any greater proportion of said loss than may be necessary to make good said three-fourths proportion of the loss sustained, except in the case of
64 buildings damaged or partially destroyed which have been surveyed and values approved by a duly authorized agent or surveyor of this company.

Also the following proof of loss and certificate, to wit:

Proof of loss.

To the Aetna Insurance Company:

William Heryford, late of Chariton County, in the State of Missouri, respectfully states that on the 20th day of February, A. D. 1864, the said Aetna Insurance Company issued a policy of insurance No. 119, Glasgow, Missouri, agency, whereby the undersigned was insured in the sum of twenty-five hundred dollars, as follows:

"For the term of one year from the 20th day of February, 1864, to the 20th day of February, 1865, at noon, on his two-story frame dwelling-house situated in Chariton County, Missouri, situated on S. E. Q. of section 10, township 52, range 17, occupied by the said William Heryford as a dwelling-house.

$2,500, @ 1 x..... 25 00

"From the 20th day of February, 1864, to 20 Feb., 1865."

He further says that no other insurance of any kind has been or was made on the same property for the term aforesaid; that the whole value of the dwelling-house aforesaid was thirty-five hundred dollars, and I am & was the owner of the land on which dwelling was situated, free of incumbrance, and I, with my family, occupied the said dwelling-house as a dwelling and for no other purpose. He further states that about the (7) seventh day of November, 1864, while said policy was in full force, the said dwelling-house was entirely consumed by fire; that

been advised

at the time said fire originated, neither was the assured or any of his family at home, & hence he has no personal knowledge as to how
65 the fire originated, but he believes the same was the result of incendiarism, & was not occasioned by the fault or negligence of the assured. He further states that due notice of said loss was given the agent of the company at Glasgow soon after the accident happened. The assured, according to the terms and conditions of said policy, claims to be entitled to receive the sum of twenty-five hundred dollars; & in event of a diference arising touching the said loss or damage, he desires that it may be submited to the judgment of arbitrators indifferently chosen, in accordance with section 12 of conditions of insurance.

(Signed) WILLIAM HERYFORD.

William Heryford, being duly sworn, says that the facts set forth in the above statement are true to the best of his knowledge & belief.

(Signed) WILLIAM HERYFORD.

Sworn to and subscribed before me this twenty-sixth day of May, A. D. 1865.

STATE OF ILLINOIS, *Greene County, ss:*

Personally appeared the above-named William Heryford, to me well known, and subscribed and made oath to the foregoing statement on this twenty-sixth day of May, A. D. 1865, before me, Henry C. Withers, notary public for the town of Carrollton, in the county and State aforesaid.

Witness my hand and notarial seal hereunto annexed.

[L. S.] (Signed) HENRY C. WITHERS,
Notary Public for Carrollton, Greene County, Illinois.

66 *Certificate of justice of the peace.*

STATE OF MISSOURI, *County of Howard:*

I, Thomas W. Morehead, a justice of the peace within and for the county & State aforesaid, do hereby certify that I am a justice of the peace for the county of Howard, in the State of Missouri, duly commissioned as such, and was the most contiguous justice of the peace, & did reside nearer the late residence of William Heryford, in Chariton County, Missouri, than any other justice of the peace or notary public; that I am not concerned in the loss sustained by said Heryford in the burning of his dwelling-house about the 7th November, 1864, as a creditor or otherwise; nor am I related to the said Heryford. I further certify that I am acquainted with the character and circumstances of the said William Heryford, who claims to have been insured against fire by the Aetna Insurance Company of Hartford, and I have made diligent inquiry into the facts set forth in his statement above signed by him, and I verily believe that he really, and by misfortune, and without fraud or evil practice, has sustained by such fire loss and damage to the amount therein mentioned.

Given under my hand this 12th day of June, A. D. 1865.

(Signed) THO'S W. MOREHEAD,
J. P. within & for Howard County, Mo.

[U. S. int. rev. five cents.]

Also the following depositions, (one of John W. Heryford's deposi-

tions is copied on page 26; it was taken on June 3d, 1866; the one which follows was taken on Sept. 29, A. D. 1868:)

Deposition of J. W. Heryford for pl'ff.

John W. Heryford, of lawful age, being duly cautioned and sworn, deposeth and says:

I am acquainted with William Heryford, the plaintiff in this
67 cause. I resided in the town of Glasgow, in the fall of 1864. William Heryford, the plaintiff, resided in Chariton County, about seven miles north of Glasgow at the same time. I was well acquainted with the dwelling-house in which he lived; I used to live there; he was my guardian; I was living there when it was constructed. In the fall of 1864 I suppose the house was worth from four thousand to forty-five hundred dollars. The house was burned in October or November, 1864, a short time after the battle of Glasgow. Capt. William Heryford was absent at the time of the burning; he had left home, and I don't know where he was at that time. We had no mails at the time, and we didn't know much that was going on from home. He had left here previous to the burning on a boat bound for Saint Louis; he afterwards moved his family to Illinois; but, where he was at the time his house was burnt, I don't know. For a year or two previous he had been engaged in farming and putting up tobacco on his farm. When he left home, he handed me his bank-book, and asked me to see to his affairs in his absence.

I heard of the burning of his dwelling-house about ten o'clock in the morning of the day on which it is said to have occurred. Knowing that Capt. Heryford had an insurance on his house, I called after I heard of the burning on Mr. James S. Thomson, the agent of the Aetna Insurance Company, and notified him that Capt. Heryford held a policy for twenty-five hundred dollars in the Aetna Insurance Company, and that Capt. Heryford had left his business in my hands; and that, as his agent, I should expect the insurance, and that the house had been
68 burned down. Some time after the burning, a Mr. Holland, an agent of the above-named insurance company, came up here, and I, in company with him, went out to the premises where the house had been burnt.

Cros-exam. by Mr. Turner.

Cross-examined by Mr. Turner, defendant's attorney:

The house I have alluded to in my examination-in-chief was in the neighborhood of Mrs. Hite's and Mr. Marion Hays's. It is the only dwelling-house of the plaintiffs that has been burnt down to my knowledge, or that I ever heard of; it was burnt down in the fall of 1864, and during the late war. At the time said house was burned, there was no other organized army in the neighborhood of the premises than the army of the United States. There was a body of United States troops under command of Col. Kuetzner, stationed at Glasgow at the time said house was burned. Squads from said force frequently went out and made excursions through the country generally. I think Col. Green first informed me of the burning of Capt. Heryford's house; it was either Col. Green or Jordan Bentley that gave me the first information of it. Col. Green was a citizen of Glasgow, and had been a colonel in the enrolled Missouri militia previously, but I don't think he held any office at that time. I don't know that Capt. Heryford assigned any reason for leaving, when he gave me his bank-book, as before spoken of. I think he had been advised

to leave though by some friend. The reason, I think he was advised to leave was that these men or soldiers that were about here at the time were lawless kind of characters, or some of them were so, and that his life might be in danger. I know that that advice had been
69 given him, but do not know that he was influenced to leave by that advice. I suppose it was a couple of days after the advice was given before he left; I think I have heard him say that he did not think his life was in danger, and at the time the advice was given, treated it very lightly and seemed surprised that such advice had been given him; stated that he had not done anything to endanger his life, and did not know what any one could have against him, and that he had been among these troops that he had been warned against. It was considered more safe in town, where the headquarters of these troops were, than in the country, and many persons of all parties came into town for safety, the troops in town being considered as under better control than when under their subordinate officers in the country. I don't recollect the names of any of the lieutenants; there was one of the lieutenants whose name I do not know, that was regarded as a desperate or bad man. After hearing his name called, I remember now one Lieutenant Self was one who I have heard spoken of, and who was regarded as of the character last alluded to. I think this lieutenant usually got the credit for most of the mischief that was done. Capt. Meredeth came in for his share also. Capt. Heryford left about two days after receiving the advice before alluded to, and did not return until the close of the war. I think he put up a crop of tobacco in the winter of 1863 and 1864, and worked it up during the summer, but at what time he got through I cannot tell. I know some in hogsheads was burnt here, in the warehouse of B. W. Lewis & Bro's, in Glasgow,
70 on the 17th day of October, 1864, but I don't know how late it was put up. I think all the tobacco he shipped was branded W. H., but don't know how that in Lewis' warehouse was branded.

I don't know how long after he left it was before his house was burnt. It might have been a week or two weeks.

Re-exam. by pl'ff's att'y.

Re-examined by plaintiff's attorney:

I think I shipped for Capt. Heryford during the year 1864 about one hundred and thirty-nine hogsheads of tobacco. Whoever told me about the burning of Capt. Heryford's house also told me that he had gotten the information from Dolly Blacknell, who lives beyond Capt. Heryford's, and came by there that morning, and who, I think, was standing by at the time.

Col. Green volunteered to speak to Col. Kuetzner, who was in command here at the time, about the burning of Capt. Heryford's house.

(Signed) Ja W. HERYFORD.

Dep. of Ja's S. Thomson.

James S. Thomson, being duly cautioned and sworn, deposeth and saith:

I was the local agent for the Aetna Insurance Company, in Glasgow, in the year 1864. William H. Holland was the State agent at the same time, and still is, I think. I was informed of the burning of William Heryford's house about the time of its occurrence, by John W. Heryford. I notified Mr. Holland soon afterwards that the house was burned,

and that there was a policy on the house. Mr. Holland came up about the first weeks of December, and made some investigations in regard to the matter, and took some testimony.

(Signed) JA'S S. THOMSON.

Dep. of Tho's Shackelford.

Thomas Shackelford, of lawful age, being produced, sworn, & examined, deposes and says:

71 I was, during the winter & spring of 1865, residing in the city of St. Louis, in the State of Missouri. I was practicing law in connection with Washington Adams, now of Booneville, Mo. Some time in the winter or spring of 1865 the plaintiff employed the firm of Adams & Shackelford to try & obtain his insurance for the burning of his dwelling-house in Chariton County, he having a policy of insurance on same, issued by the Aetna Insurance Company at their agency at Glasgow, in Howard County. As soon as we were employed, which, I think, was prior to the 15th Ap'l, 1865, I called at the office of the Aetna Insurance Company, or rather at the office of their agency, in St. Louis. I had a conference with a Mr. Morrison, who assumed to act as agent of the company. Morrison told me that a Mr. Holland attended to the cases of the insurance company in the State; asked me to leave a card, & that Holland would call & see me. I did so, and a few days afterwards Mr. Holland called on me at the office of Adams & Shackelford, and we had a conversation in regard to the loss sustained by Mr. Heryford. He stated to me that the company had not as yet determined what to do in the case. He then advised me to have the preliminary proof taken and filed with the company, and then let the matter remain in statu quo for a while. I then prepared the affidavit, which was signed and sworn to by the plaintiff, and attached thereto the certificate of a magistrate or notary public, which was signed & certified by the officer, stating his investigation of the circumstances of the fire. I do not now recollect the name of the officer who made the certificate, but my recollection is, that it was one who resided in

72 Chariton County & in the vicinity of Capt. Heryford's late residence. I think he certified that he was the nearest magistrate or officer to the dwelling-house. I took this preliminary proof to the office of the company in St. Louis, and my impression is I handed it to Mr. Morrison, who placed it in the desk of Mr. Holland, who seemed to have a desk in the same room, or was so stated by Mr. Morrison. Mr. Holland afterwards admitted to me that he had received the preliminary proofs which I had left.

Mr. Adams & myself, as attorneys for plaintiff, afterwards commenced a suit against the defendant in the Howard circuit, where there was subsequently a trial of the case. At this trial Mr. Holland was present, together with R. T. Prewitt & Emmet Hayden, attorneys for defendant. At the trial it was admitted by the defense that the notice & preliminary proofs required by the conditions of the policy had been made, & that the house was of the value as stated in the petition, and had been destroyed by fire in the fall of 1864.

(Signed) T. SHACKELFORD.

Dep. of Jordan Bentley.

Jordan Bentley, of lawful age, being duly cautioned and sworn, deposeth and says:

I resided on my farm in Chariton County, in the year 1864, about three-quarters of a mile from the residence of William Heryford, the plaintiff in this cause. He is a brother-in-law of mine. I was acquainted with his dwelling-house before it was burned. My opinion is, that at the time it was burned it was worth five thousand dollars. It was burnt in 1864, the Monday before the November election, which was on Tuesday. The next day after the burning I was in Glas-
73 gow, in Thomson & Dunnica's banking-house, when I first heard that Heryford's house was burnt. I went immediately into Col. Kuetzner's office; there I met with Major Ja's W. Lewis and Col. C. H. Green; I told them that Heryford's house was burned; that it was burned that morning. Just at that time Col. Kuetzner came along, and Major Lewis and Col. Green told him that Heryford's house was burned, and he, Col. Kuetzner, wanted to know of me who did the burning. I told him that I did not know; but that the negro boy that came in said that the soldiers that went out the evening before from Glasgow had burned it. It seemed to excite him considerably, and he said that they had no such orders from him—he, Col. Kuetzner, was commanding the post at Glasgow at that time—& said that it was bushwhackers that came in after his men had left that had done the burning, & went and brought a book in which was written the orders that he had given his men. I read the orders myself, and they were to arrest Bentley, Hume, and Peyton, and bring them to town.

Cross-exam. by def't's att'y.

Cross-examined by defendant's attorney:

The dwelling-house of Heryford, alluded to above, was in the neighborhood of Marion Hays and Mrs. Hites. It was the only dwelling-house of Mr. Heryford's that had been burnt down. I left home the Sunday evening before the house was burnt, and the house was burnt on Monday morning. As I was coming to town I met United States troops going out that way; they were about two miles from Mr. Heryford's when I met them. I do not suppose there was more than thirty or forty of them; they were on horseback; they were going in
74 the direction of Mr. Heryford's. I do not know what lieutenant was along with them. I did not know Lieutenant Self at the time, but afterwards became acquainted with him. I think Lieutenant Self was with the company. When Col. Kuetzner was informed of the burning he seemed not to have heard of it before; he spoke as not having before heard of it. There was no bushwhackers in the neighborhood at the time, that I know of; but they were in and out most the time. I suppose the United States [States] troops may be said to have had control of Howard County and the neighborhood at the time; but there were bushwhackers passing backwards and forwards. I do not know whether it was the habit of Col. Kuetzner to record all his orders in the book he showed me; it was the first and last time I ever saw his book. I read no other order in his book than the one spoken of; there was other writing in the book and on the same page; whether they were orders or not I don't know, as I did not read anything else than the order alluded to; I read nothing but the order in relation to myself, Hume, and Peyton.

(Signed) JORDAN BENTLEY.

Def't reads depos. in evidence.

The defendant then read in evidence the following depositions, to wit:

Depos. of Ja's Heryford.

James Heryford, of lawful age, being duly cautioned and sworn, deposeth and saith:

I am acquainted with Mr. William Heryford. I belonged to him up to the time that the black people were set free here. I followed farming; was Mr. Heryford's foreman in carrying on the farm. I was living at home, on his farm, at the time his dwelling-house was burnt. The house
75 was on his farm in Chariton County. I do not recollect the date when the house was burnt. Mr. Heryford's family lived in the house at the time it was burnt, but he was absent at the time. I was present at the time the house was burnt. On Sunday evening (before the house was burnt on Monday morning) some soldiers came there; they said they were federal soldiers, and ordered supper for thirty-five men, and feed for their horses. They asked me was not my master a rebel. I told them I did not know; that he did not tell me what he was, and they said that I knew that he was a rebel. They asked me, had not he been feeding Jackson and all of his men there; and I told them he had not. They said that he had been feeding him there; and I told them that Jackson had been there twice that I knew of, and ordered his dinner like other soldiers; and they asked me then, did not he, Mr. Heryford, have them to come there; and I told them no; that he was as much opposed to it as any man I knowed of. They said they knew that he had them to come there, and that they were going to burn his house. I told the lieutenant that I did not think they ought to pester his house; that he was not at home. When I told him that he was not at home, he asked me, what did his wife go off for; and I told him that she went off to her brother's that morning because she was lonesome at home. Then he asked me, why did she come home and start off again when she saw them acoming for. I told them that she come back after her son; that he had been gone off with some of the neighbor's boys all day, and she came back after him; and they said they thought she went off because she saw them acoming to get shed of cooking for them. I told them no, that she did not do that, that she was going to her brother's before she saw them coming.
76 I told them that she had a baby about two months old, that she had left at her brother's, and had to go back to it. They then told me that I had to see that supper was got for thirty-five men; that I had to have chickens, turkey, and a plenty of coffee made; after we got supper for them, he told me to go and have chickens and turkeys killed, and have breakfast ready for them by four o'clock next morning. After supper was over, when I went into the house to get coffee to parch, one of the privates told me that they were going to burn the house. I come on through the room where the lieutenant was; I told him about it. He said no, he reckoned not, that he would see about that. He told me that I was to mind and not to fool with them soldiers; that they might hurt me. I told him I was not going to fool with them, but was going to do everything I could to oblige them to keep them from setting the house afire. I went on out there and said no more to them till next morning. We started out about three o'clock to getting breakfast; we had breakfast ready on the table at four o'clock, and they all eat their breakfast; after they had eaten they all saddled up their horses, and all went

out of the yard, except just two, and one of them pretended to lose a pistol, and he was hunting for it round through the house, and he said if the pistol was not found they was going to burn that house before they left; and they were searching each other for the pistol, and said if it was not got they was going to burn the house. I told them if it was there I would find it and bring it to Glasgow. The lieutenant told me, if I found it and brought it to Glasgow, he would give me
77 two dollars. I told him then, if he would just let the house alone, and not let his men burn the house, that if I found it I would bring it to Glasgow without the money. He told me then he wouldn't touch the house, and ordered them all on their horses. They all got on their horses and formed a line, except two. Them two had a straw bed-tick full of straw; one of them went dragging it up-stairs, and I went and told the lieutenant, and he told me to come on back to the house and he would go and see about it. When he went back he got down off his horse and told me to hold him. He went on up-stairs after the men, and I heard him saying something to them, but could not understand what it was. When he come down he made them get on their horses, and they all rid off. They had not got off more than a quarter of a mile at farthest until two come riding back. They come as hard as they could ride, and jumped down and threw their bridle-reins over the gate-post, and they run right into the house. One of them gathered up a shovel of fire, and the other a chunk of fire. One went up into the girls' room, and the other into the boys' room; and when they done that they commenced busting out the window lights and sash, and I run in behind them, and asked them might I take out the things out of the house. They said, "Take out what you damn please, but don't you pester this fire;" and I then called the balance of the family there and got out what things we could. They set the house on fire; they put fire in the book-case and gun-case down stairs; they went up-stairs and set it afire, one of them did, though I didn't go up-stairs in the boys' room. The house burnt down from that fire. Then they took a shovel of fire
78 and went to the stable and set it afire in the loft; there was no hay though in the loft, and it did not burn fast. After they set it on fire they come out and went off, and forbid us from pestering the fire. Old mistress (Mrs. Hite) come over and told us to put the fire out the stable; and I told her that they had told us that if we did that we would go up. Mrs. Heryford come home about the time the house was falling in. The soldiers all come back about an hour or hour and a half after the house had burnt down; about three hundred of them then. I don't mean there was three hundred at first. They asked how come that house burnt, and I told them some soldiers burnt it. In this last lot of soldiers I saw some that was in the first lot; they were dressed as federal soldiers. They (the first lot) said they were Knetzner's men. The first lot was armed with pistols and guns. I was at Mr. Wills's when I saw the first lot of soldiers going towards the house. They called in at Mr. Wills's where I was. I went on home through the fields, and they went on round. They started before I did. When they got to the house they met Miss Betsy Heryford; she was leaving. They asked her where she was going. She told them she was going to her baby at her brother's. They then asked why she left when she saw them coming. She told them that she started before she saw them. They said they thought she was going because she saw them acoming. She told them she was not. They said to her that they wanted their supper got; and she told them that Jim was there and would see to it, and have them attended to just as well as if she was there. She told

me just to do everything for them that they wanted me to do, and gave me the keys to give them when they wanted to look for anything—just to give the keys to them. The soldiers did not take anything
79 from me. They took some flour from Mr. Wills, was about all they took from him. They took a saddle that Miss Betsy told me to carry down to Mr. Wills's, and to claim as mine. She said if I claimed it they wouldn't take it.

There was none of the white family at the house when the first lot of soldiers come on Sunday evening, but Mrs. Heryford and her little son, and they both left. My son Wesley and my wife and Jane Heryford was all that was there when the soldiers first come, and Martha come afterwards. Frances may have been with Miss Betsy, but I do not know. I don't remember that she was there when we was getting supper. Myself and Jane and Martha is all that I remember that assisted in cooking supper and breakfast. On Sunday night I smelt coal oil, and I asked the lieutenant what did that mean. He said that he did not know, but he expected some of the boys had wasted some when they were putting it in the lamp. I did not see where they had put any, but thought from the smell that maybe they had put it on the floor. I had no talk with any of the officers, except the lieutenant, about the burning of the house. The privates told me out of doors, directly after they come, that they were going to burn the house. When they said that I told them that I did not think they ought to pester the house; I wished they would not just on that account that there was none of the white ones at home. There was some three or four soldiers present or in hearing when this conversation occurred. I don't know how many soldiers there was, though they ordered supper for thirty-five,
80 though Mr. Harrey and Dr. Johnson was with them. I think there was about the above number. When the soldiers were talking about the lost pistol there was a good many of them present; the two that was disputing about the lost pistol were at the porch door, and went out to the stile-block, and then were all searching each other for the pistol. The soldiers then went back to the house, and went around it several times. When the two soldiers come back and set the house on fire the balance of the soldiers were in sight, and not more than a quarter of a mile off. I don't know whether they had stopped or not, nor whether their faces were toward the house or not.

Cross-exam. by pl'ff's att'y.

Cross-examined by plaintiff's attorney:

This squad of men that came on Sunday evening were under the command of the lieutenant that I talked with, as given in my examination-in-chief. That lieutenant told Miss Betsy Heryford, who is the wife of Mr. William Heryford, the plaintiff, during their conversation when they first met, that he would not let anything be hurt. There was two or three that spoke about burning the house, and I don't know which, in the first conversation in the yard. When I went to get the coffee there was but one that spoke to me about burning. In the morning one spoke to me at the corner, and said they were going to burn the house; and another one, standing close, said yes, they were going to burn out Jackson's den. I reported this to the lieutenant. He said they should not pester the house; that he would attend to that; that he would see that they did not burn the house. After the lieutenant went back after the two soldiers, who he brought out before him, he was the last one that
81 left the house. After the lieutenant left the house he drew them

all into line, and they counted off, and moved off two by two. I could not say for certain that the two men that came back and burnt the house were any portion of those that stayed all night. The company that stayed all night went off toward Marion Hays's, and the three hundred that came an hour or hour and a half afterwards come from the same direction. Some of them asked who burnt the house.

Re-exam. by def't's att'y.

Re-examined by defendant's counsel:

I think from the appearance and dress that the two men who came back and burnt the house were a part of the first gang that came to the house, but I cannot say for certain. They came from the direction of the squad that was still in sight; the other squad of men had not then got in sight, and did not until about an hour and a half afterwards. At the first conversation about the burning of the house I don't think there was more than two or three other soldiers present or in hearing, and I think there was that many. When I went in for the coffee there was a good many laying on the floor, but I don't know whether they were asleep or awake. At the time the one soldier spoke of burning the house, I don't know whether any other one was awake. At the time the burning was spoken of at the corner of the house there was none present except the two. At the time they were disputing about the lost pistol, and speaking of burning the house, most all of them were present; it was out in the lane, and they said they would have the pistol or burn the last house on the place. This was at the time the two soldiers were searching the other soldiers for the pistol. They did not find the pistol among the soldiers, that I know of. The man
82 Jackson spoken of was a bushwhacker that had been in the neighborhood. I did not make any effort to put out the fire while the house was burning, because the soldiers had told me that if I did I would go up. I was afraid to make any attempt to put it out.

Re-cross-exam. by pl'ff's att'y.

Re-cross-examined by plaintiff's attorney:

There was none but those two men that made any fuss about the pistol, or did the searching in the lane, or that made any threats while the searching was going on, that I heard of. I thought that the two soldiers that came back and burnt the house belonged to the same company that was there the night before, from their dress or United States uniform—not from their faces.

Re-exam. by def't's att'y.

Re-examined by defendant's attorney:

At the time of the several conversations in reference to burning the house I did not hear any of the other soldiers object to the burning, or say anything about it either way.

(Signed) JAMES his + mark. HERYFORD.

Dep. of Jane Heryford.

Jane Heryford, of lawful age, being duly cautioned and sworn, deposeth and saith:

I am living with Mr. William Heryford, the plaintiff in this cause. I

belonged to him until the black people were set free, and have lived with him ever since, with the exception of about one month. I was at home the morning his dwelling-house was burnt in Chariton County, and the night before. I was in the house with Miss Betsy when the soldiers come there. I was up-stairs and saw them through the windows. I came down-stairs and told her some soldiers was coming. She said she was going down to Mr. Bentley's. She said she knew they was going to burn the house that night, and she would not stay. She said she wanted us all to get supper for them the best that we could.

83 They come in the kitchen and asked us what did she go away for. I told them she had a young baby down to Mr. Bentley's, and was obliged to go and attend to it. And so they said they believed she went away because she saw them coming, and if they knew it was so they would burn the house down before the went away from there. There was a good many soldiers in the kitchen at the time. I did not pay any attention as to how many there was. They were passing backwards and forwards all the time. We got supper for them as we were told to do, and we killed a lot of chickens and turkeys so as to have early breakfast; and we had breakfast for them about three o'clock, and they all eat and were done before daylight. Some of them got up in the night and said they believed somebody had been there, dressed in women's clothes, and disturbed them; and if they were disturbed any more they would burn the house down that night, and would not wait till morning. And so next morning there was two of them come in the kitchen and said they had lost a pistol, and they intended to have it, or they would burn that damn building down. And there was another one came in and says: "Auntie, some of the boys may drop a coal of fire in that white building this morning; and, if they do, there must none of you put it out." I told him I did not think they ought to do so, and set the house afire. And they said they would do it. They said that Cap. Heryford had kept old Jackson harbored there all the year. They asked me if they did not come there two or three times a week and eat, and I told him they did not; but Mr. Jackson come when he pleased; that Capt. Heryford could not help it; could not help the soldiers coming there. And so I told them not to set the house on fire; that there was none of the white folks there, and they would lay

84 it on the black ones; to wait until they come home. They wanted to know why we negroes were taking on so about the white people's things. I told them it would break us up, as well as the white people. I requested of them to let us take the things out of the house before they set it afire; and they asked what we was going to do with them, and I told them we was going to take them out for ourselves; and they said well, we could take out as much as we wanted, but that we had better not give any of them to the white people; that they were nothing but damn rebels nohow. Well, I asked the lieutenant if he was agoing to let them burn the house, and he said no. They all went off then, after breakfast awhile, and we black ones went about hunting for the pistol they said they had lost. After a while two of them come back just as hard as they could come. They ran into the house and got fire; they went up-stairs with it, and commenced setting fire to the house then, and commenced kicking out the window-sash. Jim he went in and asked if he could take the things out; they said: "Take, and be damned; but don't touch this fire." Jim hollowed to us all to come and take out what things we could; that maybe we could same some of them. They went then to the stable, and set it on fire; and as they went along they said: "You had better none of you touch

that fire; if you do you will all go up, and every house on this place." I did not see any oil on the floor; I did not go in after the table was set until after the house was set on fire, but I smelt the oil very strong. After breakfast I went into the dining-room, and smelt the oil very strong; that was the room the soldiers eat their breakfast in. The lieutenant sat in the same room with the rest of the sol-
85 diers. It seemed to me to be about a quarter of an hour from the time they all left until them two come back. When they spoke of burning the house, in the kitchen, one would speak of it, and then another. There was several of them in there, and several of them spoke of burning it. I have no idea as to how many of them spoke of it, but there was some six or seven in there at the time. I never heard any one of them object to burning it that night.

Cross-exam. by pl'ff's att'y.

Cross-examined by plaintiff's attorney:

The soldiers that night were standing round in the kitchen while I was cooking; some appeared to be in a good humor, and some were very mad. They were not cutting up any, but were quiet. That was all I heard about burning that night. In the morning after those two were talking about burning the house, the lieutenant said to me that he was not going to let them burn the house; that they had done devilment enough already. This was said in answer to an appeal from me to him to prevent them from burning the house after we had treated them so kindly. There was only two men talking about burning the house when the lieutenant came in, and they stopped talking and immediately went out to the dining-room; it was then that I asked him if he was going to let them burn the house. The lieutenant was the last one that left the yard, and they all then formed a line and went off. About a quarter of an hour afterwards two men came from the direction of Mr. Marion Hays's riding very rapidly from the same direction that the soldiers had gone. The two men were dressed in United States
86 uniform.

Re-exam. by def't's att'y.

Re-examined by defendant's attorney:

The two men that came back [back] and set the house on fire, looked like the same men that had left there and were dressed like them; from their appearance I thought they were some of the same men. I don't know that they had cut up any, more than talking They were not talking loud and boisterous, only when they were in the house. From their conversation and threats I was afraid to do anything towards putting out the fire, or to prevent their setting the house on fire. These soldiers were dressed like United States soldiers.

Re-cross-exam. by pl'ff's att'y.

Re-cross-examined by plaintiff's attorney:

I only thought those two men that came back and set the house on fire were the same that had eaten breakfast there; were the same from their having on the same kind of uniform. After the house was burnt down some three or four hundred came there dressed in the same uniform.

Re-exam. by def't's att'y.

Re-examined by defendant's attorney:

The two soldiers that set the house on fire came from the same direction that the squad of soldiers had gone that had eaten breakfast there. I don't know which course they went after they fired the house; I was engaged in trying to save the furniture.

(Signed) JANE her + mark. HERYFORD.

Dep. of Frances Heryford.

Frances Heryford, of lawful age, being duly cautioned and sworn, deposeth and saith:

I am acquainted with Mr. William Heryford; I belonged to him until the time the black ones were set free. I was living with him at the time
his house was burnt in Chariton County. I was at home on the
87 Sunday immediately before the house was burnt, but had started
down to Mr. Bentley's about the time the soldiers came there. Martha Heryford and I met them on the road, and we went back. I am not certain whether they told us to go back or not, but we did go back to Mr. Heryford's. After we went back home they ordered supper. After they got the supper over, I was in the dining-room and heard them say they was going to set the house on fire. I don't think there was but two of the soldiers present when this was said; one was standing in the door, and the other by the table. I did not hear them say why they were going to burn it down. I heard no more said about it that night. They ordered breakfast to be ready very early next morning. We had breakfast for them very early. When we went in to set the table I smelt coal oil very strong, and asked some of them what the coal oil was doing stinking so, and they said it was none of my business; but talking to themselves, they said they was going to burn the damned old house down. I heard one fellow say he had lost a pistol, and if they did not find it they would burn the damned old house down; that they wanted to do it anyhow. This was when they were about starting. They all went out and got on their horses, and I heard no more threats about burning the house. They all went off then and counted and formed into a line and started off. I don't know whether it was a half hour afterwards when two of them came back riding in fast haste, and commenced setting the house afire. Then they commenced kicking out the window-lights. The first fire commenced up-stairs, I think. After the fire commenced,
pap, that is Jim Heryford, called us to come in and help get the
88 things out. Then they went on, and one man, that is, one of the
soldiers, went on to the stable and set it afire, but it did not burn down. Then both of them got on their horses and went down the road towards Mr. Marion Hays's in the same direction the rest of the company had gone. I did not hear them forbid any one to put the fire out. I don't think there was more than three persons when they were talking about losing the pistol and burning the house. I was not at the house all the time, and only heard three conversations about burning the house.

Cross-exam. by pl'ff's att'y.

Cross-examined by plaintiff's attorney:

Jane, I think, was present, when these men were talking about losing

the pistol and burning the house. The lieutenant came into the house, and these two men went out before him. I think those two that had lost the pistol were the two that were talking about setting the house on fire. When these two men were searching for the pistol in the house the balance of the men were out in the yard, and I think these were the ones I heard talking about the burning in connection with the loss of the pistol. The lieutenant was the last one that left the yard. I don't think it was quite a half hour afterwards before the two men came riding back that burnt the house.

(Signed) her FRANCES + HERYFORD. mark.

Dep. of M. Cockerill.

Martha Cockerill, formerly Martha Heryford, being duly cautioned and sworn, deposeth and saith:

I am acquainted with Mr. William Heryford; formerly belonged
89 to him. I was living with him at the time his house was burnt in Chariton County; it was during the late war. I was at home when the house was burnt and the evening before. I had had some company the evening before the house was burnt, and had started home with them. I and Frances was together; we met the soldiers and they asked us who we belonged to; we told them Mr. Heryford, and they said they was going there. They asked where I was going, and I told them to Mr. Bentley's. They said I had better go on home, that they were going there for supper. They asked if we had anything to eat there; I told them no; that we had neither meal nor flour, only a little for our breakfast. They said then we could borrow some, and asked me which was the nighest neighbor to us; I told them Mr. Wills was the nighest neighbor to us, and they said then they would go and get some from Mr. Wills's. Me and Frances ran on home and told Miss Betsy that the soldiers was coming. I also told her what the soldiers said about supper, and she gave me the smoke-house key then, and then she started off, and had got to the stile-blocks just as I got to the smoke-house. As soon as I got to the smoke-house one of the men rode up and asked me who was that that had started off, and I told them it was Mrs. Heryford; he asked me where was she agoing to, and I told him to Mr. Bentley's, to her baby. They asked me was she a going to stay all night, and I told them that she was; and one of the men told me to go and make her come right straight back. Another one spoke up and said no, not to trouble her, but let her go on to her baby if she wanted to. She had given Uncle Jim the keys and told him [and told him] to
90 give them to the soldiers, & she told me to get the keys from Uncle Jim and to go with the soldiers, and not to let them burst open anything. They went in and took the pillow-slips off of the pillows, and got what they wanted and crammed into the pillow-slips. They went into the parlor and into the side-board, and commenced searching in them and found some calico. I heard them a talking; there was three different pieces of calico in the drawer. And I heard them say they believed that was the calico that Miss Betsy had got off of the boat when it was burnt at Glasgow. I was standing in the hall and heard them talking, and went and told them it was no such a thing, that Miss Betsy had bought that calico to make comforts of. They said they believed that was the same calico, and was going to take it, and did take it, and everything else that they could get hold of. They went on

then asking me about whiskey, and if Mr. Heryford did not keep whiskey there for Jackson; I told them no; I told them he always did keep whiskey there for his hands, and that that was what he bought it for. After they ate their supper they ordered chickens and turkeys to be killed for breakfast. After supper, one of the women that had been gone all day, came home about nine or ten o'clock in the night with some of the boys. When she come back, that disturbed them, and then they commenced cutting up, and they said they expected Mrs. Heryford had slipped around and sent the bushwhackers after them. I told them no, it was just one of our women that had come in and some of the neighbor boys.

91 I could hear them saying to each other that they expected they would drop a coal of fire down accidentally out of their pipes and set that house afire.

After breakfast I went into the big room and they had a great big can of coal oil that I did not know was about the house; it smelt like coal oil, and were pouring it down the steps and in the hall and in the parlor. I run and told Uncle Jim that I thought they was going to set the house afire from what they was doing with the coal oil. Miss Betsy had told me that she expected they would set the house afire, and if they did to set her sewing-machine out. Uncle Jim told me no, not to pester the sewing-machine, nor anything else; that he would see the lieutenant about it, and he would not let them set the house afire. I told Uncle Jim yes, that I was going to set it out; that it was of no use to be paying any attention to the lieutenant, that he was just as mean as his men was. Well, I taken the machine out, and about that time there was two of the men pretending that they had lost a pistol. Them and us black ones commenced looking for it; they said if they did not find it they intended to burn the house down. Uncle Jim told them not to disturb anything; that we would all look for it, and if we found it that he would bring it down. He told Uncle Jim that if he did not find it that he must report on Wednesday any how, and Uncle Jim told him that he would. The lieutenant ordered them to mount their horses.

The taking of this deposition was here discontinued till next day.

Martha Cockerill, formerly Martha Heryford, in continuance of her deposition commenced on yesterday, on her oath further says:

92 After the soldiers mounted their horses, as stated in my deposition yesterday, they started off, and as they did so I went to the cabin; and after I had been there about a quarter of an hour Rene came running in and told me that two of the soldiers was coming back. Just as I got to the door I saw them get off of their horses, and throw their bridles over the gate-post, and they went into the house, and Wesly, Uncle Jim's son, (who is now dead,) went in with them; and when they went in they commenced knocking out the window-lights. I sent one of the children in to ask Wes. to come out; I wanted to ask him what they was doing. Wes. came out. I told Jim I was going in to pack the things. I went in and the fire was in the gun-case and book-case. The men come down and asked me what I was going to do. I told them I was going to take the things out. They said I could take out as much I pleased, but I had better not pester that fire. I did not see them when they got the fire.

They went into the stable, and one of them took fire with him. He set the stable on fire, and then they come back and stood on the stile-blocks awhile, and then got upon their horses again and went towards Mr. Hays's. I did not see which way the two soldiers come from, as

they were at the style when I first saw them. I did not pay any attention to them. I only saw they had on blue clothes. They seemed to be familiar when they ran into the house, and seemed to know where to go to. I saw them go from out-doors into the little room from the porch. There was fire in both rooms. They also went up-stairs into the girls', woman's, boys' room. I think the lieutenant was out in the yard with the rest of the soldiers when the oil was poured about in the
93 house, as before spoken of by me on yesterday; he was near the house, and the soldiers also in the yard round about the house. I don't know whether they were close enough to smell the oil or not; I don't recollect whether I smelled it in the yard or not. I don't know whether the lieutenant went into the house after the oil was poured or not. I don't recollect who was the last one that left the house. When they was around there looking for the pistol Uncle Jim was talking to the lieutenant about it. I don't know whether the lieutenant was the last one that left the house or not. I cannot state the exact date on which this house was burnt. It was during the late war; I think it was something like a month after the battle of Glasgow. When I say Uncle Jim, I mean James Heryford, one of the witnesses that gave testimony yesterday. There was but two soldiers engaged in pouring the oil, and they whispered to each other so that no one else could hear them. I was peeping at them and saw them whispering, but they did not see me.

The house above spoken of is near Mr. Marion Hays's farm, and also near Mrs. Hites. It is the only dwelling-house of Mr. Heryford's that was burnt in Chariton County.

(Signed) her MARTHA + COCKERILL. mark.

Dep. of Henry Heryford.

Henry Heryford, of lawful age, being duly cautioned and sworn, deposeth and says:

I formerly belonged to Mr. William Heryford, up to the time the black people were set free. I was at home at the time his dwelling-house was burnt in Chariton County during the late war. I was there also the evening before it was burnt. I started off just as the
94 soldiers got into the lane; they made me come back and go into the corn-field and get corn for their horses. I was gathering corn till late in the night and fed all the horses. Then I asked them, after I got the horses fed, might I go to sleep, and they said yes, which I did. The next morning they had me up by times and in the field again after corn to feed their horses. After I got the horses fed I went back to the cabin and set down. Then, when they all got their breakfast, I seed them all start off; and after they had all gone off two come back and went in the house; and when they come out of the house the house was afire. I see them go out to the stable, and when they come away from the stable the stable was afire. I don't know any more; I did not go amonst them much. The house burnt down; the stable did not.

(Signed) his HENRY + HERYFORD. mark.

This was all the evidence in the case.

Court instructs jury—ruling of court.

The court then, of its own motion, instructed the jury as follows:

The jury are instructed that if the house was burned by a few soldiers not acting at the time as an organized force, but through their own private wantonness, malice, or revenge, and without any orders or authority from any officers to whose command they belonged, or if a few soldiers having left their military company or organized force for the purpose of firing the house, through private wantonness, malice, or revenge, did so fire the same, without any order or authority from any officer in command, then said firing was an act of private incendiarism, and not within the exceptions of the policy referred to;

95 to which instructions the defendant then and there duly excepted. And this was all the instruction given to the jury.

And afterwards the defendant duly filed its motion for a new trial, as follows:

Def't files a motion for a new trial.

[Said motion for a new trial has been copied on page 50.]
Which the court overruled on a hearing thereof.
To which the defendant then and there duly excepted.

Now, that these matters may be duly preserved of record, the defendant tenders this bill of exceptions, and prays that the same be allowed, signed, & sealed, which is done.

(Signed) SAMUEL TREAT, *Judge.* [SEAL.]
" A. KREKEL. [SEAL.]

And afterwards, at said term of said U. S. circuit court, begun and held as aforesaid on Wednesday, the 19th day of May, A. D. 1869, the following further proceedings took place in this case, to wit:

Order granting a supersedeas.

WILLIAM HERYFORD, PLAINTIFF, *ag'st* THE AETNA INSURANCE COMPANY, DEFENDANT. } Removed from circuit court of Howard County.

This day comes the defendant, by attorney, and, on his motion, it is ordered that a supersedeas be granted staying the further proceeding upon the judgment rendered in this case, a writ of error having been allowed by a judge of this court to the Supreme Court of the United States, and bond, with [securities] *sureties*, executed and approved as required by law.

A writ of error having been issued in the above cause, the following bond was filed:

96 *Bond.*

Know all men by these presents that we, W. Henry Holland, as principal, and Ebenezer Mawdsley and Ben White, as sureties, all of Saint Louis, Missouri, are held and firmly bound unto William Heryford in the full and just sum of four thousand dollars, to be paid to the said William Heryford, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents,

sealed with our seals, and dated this nineteenth day of May, in the year of our Lord one thousand eight hundred and sixty-nine.

Whereas lately, at the April term, A. D. 1869, of the circuit court of the United States in and for the districts of Missouri, in a suit depending in said court between William Heryford, plaintiff, and the Aetna Insurance Company, defendant, judgment was rendered against the said Aetna Insurance Company; and the said Aetna Insurance Company having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said William Heryford, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such, that if the
97 said Aetna Insurance Company shall prosecute said writ to effect, and answer all damages and costs if it fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

W. HENRY HOLLAND. [SEAL.]
EBENEZR MAWDSLEY. [SEAL.]
BEN. WHITE. [SEAL.]

Sealed and delivered in presence of—

Approved by—

SAMUEL TREAT, *Judge.*

Certificate.

UNITED STATES OF AMERICA, *Districts of Missouri, ss:*

I, Benjamin F. Hickman, clerk of the circuit court of the United States in and for the districts of Missouri, do hereby certify the foregoing to be a full, true, and complete transcript of the record and proceedings in a case wherein William Heryford is plaintiff and the Aetna Insurance Company of Hartford, Connecticut, defendant, as fully as the same remain of record and on file in this case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in said districts, this 31st day of July, in the year of our Lord eighteen hundred and sixty-nine.

[SEAL.] BEN. F. HICKMAN,
Clerk of said Court.

98 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the districts of Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, at the April term, A. D. 1869, of said court, between William Herryford, plaintiff, and the Aetna Insurance Company, defendant, a manifest error hath happened to the great damage of the said Aetna Insurance Company, as by its complaint appears; we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the

same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held; that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, this nineteenth of May, in the year of our Lord one thousand eight hundred and sixty-nine.

Issued at office in the city of St. Louis, with the seal of the circuit court of the United States for the district of Missouri, dated as aforesaid.

[SEAL.] BEN. F. HICKMAN,
Clerk C. C. U. S. Missouri Districts.

Allowed by—

SAMUEL TREAT,
Judge of the U. S. Dist. Court for the Eastern Dist. of Mo.

99 UNITED STATES CIRCUIT COURT, *Districts of Missouri:*

In obedience to the within writ of error, I herewith transmit a transcript of the record and proceedings in the case of William Herryford, plaintiff, against the Aetna Insurance Company, defendant, as the same remains on file in my office.

In witness whereof I hereunto subscribe my name this second day of August, A. D. 1869.

BEN. F. HICKMAN,
Clerk of said Circuit Court.

(Indorsed:) William Herryford, plaintiff, vs. the Aetna Insurance Company, defendant. Writ of error.

100 The United States of America to William Herryford, greeting:

You are hereby cited and admonished to be and appear at a Sureme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the districts of Missouri, on the 19th day of May, A. D. 1869, wherein the Aetna Insurance Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Treat, one of the judges of the circuit court of the United States in and for the districts of Missouri, this nineteenth day of May, in the year of our Lord one thousand eight hundred and sixty-nine.

SAMUEL TREAT.

101 Service of the within citation received and acknowledged this 31st day of August, 1869.

CLINE, JAMISON & DAY,
Att'ys for Plaintiff.

(Indorsement on cover:) No. 264. The Aetna Insurance Company, plaintiff in error, vs. William Herryford. Missouri C. C. U. S.

Filed 5th October, 1869.

IN THE

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1863.

WILLIAM HERYFORD,
Defendant in Error,
vs.
ÆTNA INSURANCE COMPANY,
Plaintiff in Error.

RESPONDENT'S STATEMENT.

This was a suit instituted by plaintiff to recover the loss occurring to him by reason of the loss of his dwelling by fire, under the terms of a policy issued by the defendant.

The policy insuring the plaintiff's dwelling, situated in Chariton county, Mo., against loss by fire for the period of one year from February 20, 1864, its date, is in the ordinary form, and contains a clause providing "that the Company shall not be liable to make good any loss or damage by fire which may happen or take place by means of any invasion, insurrection, riot or civil commotion, or of any military or usurped power."

The dwelling was destroyed by fire on November 7, 1864.

The evidence shows that, at the time of the fire, the country in the neighborhood of the dwelling was under the control of the Federal army. In the evening of the day prior to that upon which the fire occurred, a squad of about thirty-five Federal soldiers went to the plaintiff's house, which, in the absence of his family, was in the occupation of his colored servants. The troops remained there during the night; the plaintiff's servants furnishing food for them

and their horses. Some threats were made by a few of the soldiers during the night to the negroes that they would burn the house, but the Lieutenant in command assured the negroes that no harm should be done to it.

On the following morning the soldiers having mounted were marched off by their commanding officer in regular order. Between a quarter and half an hour afterwards, two soldiers in the Federal uniform came to the dwelling; but whether they were of the squad that had been at the house during the night, the evidence leaves uncertain. These two soldiers, having dismounted from their horses, went into the house, fired it in several places, and then rode away, and the house was consumed by the fire. So far as there is any evidence upon the point, it is all to the effect that the act of setting fire to the house was done without the knowledge or authority of any of the officers in command of the troops.

The court instructed the jury "that, if the house was burned by a few soldiers not acting at the time as an organized force, but through their own private wantonness, malice or revenge, and without any orders or authority from any officer to whose command they belonged; or if a few soldiers, having left their military company or organized force for the purpose of firing the house, through private wantonness, malice or revenge, did so fire the same, without any order or authority from any officer in command—then said firing was an act of private incendiarism, and not within the exceptions of the policy referred to."

RESPONDENT'S BRIEF.

The only question raised for the consideration of the court in this case, is whether the loss of the plaintiff's dwelling by fire took place by means of any of the excepted causes mentioned in the policy; and whether the law in reference thereto was correctly given to the jury by the court below.

It will be noticed that the policy was issued in 1864, during the pendency of the late civil war; and it does not appear that the plaintiff's property was exposed to any greater or more extraordinary hazard at the time of the fire than at the time of the issuing of the policy.

And as it must be presumed that the Company in issuing the policy assumed some risk in reference to the property insured, it is fair to infer that if it had been contemplated by the parties that the Company should be exempted from all losses occurring while a civil war, an insurrection or invasion, existed in any part of the Union, the policy would not have been issued at all.

The fire was not occasioned by a riot, because only two persons were engaged in firing the building, and three or more are necessary to constitute a riot.

And considering the terms of the policy as applicable to the condition of affairs in the locality where the property was situated, the fire did not occur by reason of an invasion or an insurrection, because the section of country in the neighborhood of the dwelling was controlled and occupied by the Federal troops. It did not take place by means of any civil commotion, for the arm of the ordinary civil power was still being wielded, and there is no evidence of any commotion or disorder existing in that section of the country. Nor did it take place by means of any usurped power, for the government to which the parties owed allegiance, and to which, in common with all other subjects, they must have looked for the protection of their property, held sway over the region where the dwelling was situated.

In Drinkwater v. The Corporation of the London Assurance, 2 Wilson, 363, Wilmot, C. J., after declaring that, in a doubtful case as to the meaning of the provisions in a policy, the turn of the scale should be given against the speaker, because he hath not fully and clearly explained himself, proceeds to say: "My idea of the words 'burnt by usurped power,' from the context, is that they mean burnt or set on fire by occasion of an invasion from abroad, or of an internal rebellion when armies are employed to support it, when the laws are dormant and silent, and firing of towns is unavoidable."

So we contend that there is no reason for holding that the loss of the plaintiff's dwelling occurred by reason of any of the exceptions in the policy above referred to, which would not be equally applicable to a fire occurring at the same period of time in any section of the Union, away from the scenes of the rebellion, or of actual warfare.

But we understand that the real ground upon which the Company claims exemption from liability in this case is, that the loss occurred by means of military power. Upon what method of reasoning they make this claim, it is difficult to discover.

It is a fact well understood that our government, in common with all established governments, maintains at all times an army of greater or less magnitude, according to its exigencies, for its security and the protection of its citizens.

And the existence of an army necessarily contemplates that there will be soldiers. And individual soldiers, no less than individual citizens, are at times likely to commit acts of wantonness, or of private incendiarism; and to the commission of such acts the property of citizens is exposed in times of peace as well as of war. But it will hardly be claimed that the clause of the policy in question was intended to exempt the Company from these ordinary hazards, or that the unauthorized acts of individual soldiers come under the designation of military power. The constituent parts of the civil power of a nation are its citizens; but when two citizens engage in a private enterprise, it is not an act of civil power. The navy is made up in large part of marines; but if a few of these, while away from their fleet and the supervision of their superior officers, commit an act of trespass upon the property of citizens, it is not therefore an act of naval power. Nor would the act of a marshal of a court and one of his deputies entirely outside of any official duties intrusted to them, be said to be done in the exercise of judicial power.

And no more by parity of reasoning can it be claimed that the deed of two soldiers, in the language of the instruction given in this case, "not acting at the time as an organized force, but through their own private wantonness, malice or revenge, and without any orders or authority from any officer to whose command they belonged," is an act done or taking place by means of military power. Such a construction as is contended for by the appellant gives to the phrase "military power" neither its plain, ordinary nor popular sense. If the Company had intended to exempt itself from losses by fire occurring by means of the unauthorized incendiary acts of individual soldiers, it could very readily have made a specific and unequivocal provision in its policy to that effect. And the

Court will certainly be little inclined to accomplish that end for the Company by a forced and unnatural construction of phrases in its policies, which, under such a construction, would become mere traps wherewith to catch the unsuspecting.

It will be observed that there is a wide difference between military power and usurped power. The one constitutes a part of the ordinary machinery of government, has a regular and systematic organization, is subjected to authority, and is controlled by rules and laws that are defined and well understood. The other presupposes the destruction of the existing system of government, and, whether its constituency is organized or not, it is at least irresponsible, and uncontrolled by the authority of that government to which the citizen has ordinarily looked for security, and to the protection of which citizens may be well supposed to have looked while entering into their contracts with each other. And viewing this subject in the light of history, it will be found that as a matter of fact the elements of an usurped power are loosely organized and practically uncontrolled. It is therefore very correctly stated in Barton v. The Home Insurance Company (42 Mo. 156), in speaking of the same clauses in a policy, that "the extraordinary hazards arising from insurrection, invasion, military and usurped power, when the arm of the civil magistrate is powerless, are expressly guarded against and excluded. An army of invasion, or engaged in rebellion, is liable to commit acts of spoliation or burning without any direct commands from the superior officers, and the insurer never intended to incur any risk by reason of such acts."

The reasoning of this decision fully vindicates the position assumed by the respondent. It is very evident that the words "military power" are used in the policy as synonymous with military authority, and was intended to protect the Company against losses occurring when the country is in a state of war, and for military purposes the destruction of private property is ordered by those having command of the army; and when, indeed, whole districts of country in the occupation of friends or allies may be desolated for the purpose of harassing the enemy or affording an opportunity for the movements of the friendly army.

F. A. DICK,

Attorney for Respondent.

Supreme Court of the United States

DECEMBER TERM, 1869.

WM. HERYFORD,

Defendant in Error,

vs.

ÆTNA INSURANCE CO.,

Plaintiff in Error.

STATEMENT AND BRIEF

Of Defendant in Error,

BY F. A. DICK.

Supreme Court of the United States,

DECEMBER TERM, A. D. 1869.

No. 264.

THE ÆTNA INSURANCE COMPANY, Plaintiff in Error,

vs.

WILLIAM HERRYFORD, Defendant in Error.

BRIEF

BY T. W. BARTLEY,

OF COUNSEL FOR PLAINTIFF.

This case involves the single point, whether the court below erred in the instructions given to the jury; and that depends on the interpretation to be given to an exception to the liability for loss under the policy. The language of this exception is as follows:

"Provided always, &c., it is hereby declared that this company *shall not be liable* to make good *any loss or damage by fire which may happen to take place by means of any* invasion, insurrection, riot or civil commotion, or of *any* military or usurped power, or *any* loss by theft at or after a fire." (Page 28 of Record.)

The policy was for the insurance of the defendant's dwelling house, situated in Chariton county, Missouri.

against loss by fire, for the term of one year, from the 20th of February, 1864. The dwelling was destroyed by fire on the 7th of November, 1864, by a detachment of Federal soldiers in the field, engaged in the military service of the United States for the suppression of the late rebellion.

The policy was given during the war. Losses incident thereto, were, therefore, within the actual knowledge of the parties at the time. The company was willing to be responsible for usual or ordinary losses, but was unwilling to risk the dangers and losses happening by means of *any insurrection, riot or civil commotion whatsoever*. The language of the exception is broad, clear, and comprehensive; and the ground of its application was then manifestly in the contemplation of the parties. Had it been the intention to insure against losses incident to the then existing insurrection, the language of the exception would most certainly have been modified with reference thereto.

The record discloses the fact, that this loss by fire occurred in a short time after the battle of Glasgow, Ky., and within a few miles of which this dwelling had been situated; and that a military force was at the time stationed at Glasgow, from which detachments or squads were sent out, or allowed to go out, frequently, and make incursions through the country around. The owner of the dwelling (the defendant in error) had incurred the hostility, and excited the suspicions of the Federal forces, and had left his dwelling and gone to parts unknown. The squad of soldiers which went out from Glasgow to the dwelling and burned it, had no other ostensible business at that place. They charged, that Jackson had been harbored at this house, and that "*they*

were going to burn out Jackson's den." (See Record, p. 35, 36, 37, 40 and 41.)

The loss by fire was occasioned, *whether properly or improperly*, by a military force or detachment of the army in the field, engaged in the business of putting down the insurrection. This army had military possession and control of affairs in that vicinity, at that time, and was responsible for the direction and course of events there within its power.

Touching this state of facts, the Court below charged the jury as follows:

"The jury are instructed that if the house was burned by a few soldiers not acting at the time as an organized force, but through their own private wantonness, malice, or revenge, and without any orders or authority from any officers to whose command they belonged, or if a few soldiers, having left their military company, or organized force, for the purpose of firing the house, through private wantonness, malice, or revenge, did so fire the same, without any order or authority from any officer in command, then said firing was an act of private incendiarism, and not within the exceptions of the policy referred to; to which instructions the defendant then and there duly excepted. And this was all the instruction given to the jury."

This charge, I submit with all due deference, is founded on a misconception of the true interpretation of *the exception* in the policy, and it submitted to the jury immaterial inquiries, and that being all, and the only instruction given, was calculated to mislead the jury.

The *motives*, *feelings*, or *personal intentions* of the soldiers in burning the house were immaterial; and whether the soldiers were under due organization, at that particular time, or not, was immaterial, provided they belonged to and were acting in the common cause with the

army in the field. And it was certainly not requisite that the plaintiff in error should have proven that these soldiers were acting under any express military order from a superior officer having authority to give it. Such an interpretation would render, as it did render in this case, the provision in the policy wholly unavailing and useless. While the charge made immaterial and collateral matters important and essential in the issue depending, it fell short of a just comprehension and intelligible explication of the true nature of the issue in the case.

The risks, which the insurance company was unwilling to bear, and which were therefore excepted from the liability under this policy, were manifestly such as are usually incident to war, riot, or civil commotions. The language of the policy excepts "any loss or damage by fire which *may happen or take place by means of any*" such occurrences. An army in the field, at a time of war or civil commotion, is liable to commit acts of spoliation or burning without any direct commands from the superior officers. And it is manifest that these are among the dangers which underwriters intend to exempt themselves from, in all ordinary policies, by such exceptions as that now under consideration. And to say that to make such an exception *available* it must be shown that the detachment of soldiers committing any such spoliations was acting as a duly "organized force," and under express orders from some officer in command, would be simply rendering the exception wholly nugatory and useless.

On the terms of the exemption it can make no difference whether the loss sustained was by means of the rebel army or of the Federal army. By means of the

insurrection an army had to be brought into the field to suppress it and protect the Government; and if, by the movements of the army, and the exercise of *military power* to put down the insurrection, incidental losses and damage were occasioned to some private persons, they came strictly within the terms and reason of the exclusion from the liability of the insurer in the policy. "Loss or damage, happening or taking place by means of *any military* or *usurped power*," was excepted. If it had happened by means of power exerted in behalf of the insurrection, it would have taken place *by means of* "*usurped power*." But happening, as it did in this case, by means of the "*military power*" used to put down the rebellion, it falls with equal certainty within the exception of the policy. And in case of either riot or civil commotion, if, in the conflict which takes place, loss or damage be occasioned to the insured by either side engaged in the struggle, it would come within the rule of this exception. It is not even claimed, in argument on the other side, that the rule can be changed by the loss having been caused by the act of the Federal, instead of the rebel side.

The case of Barton *et al. vs.* The Home Insurance Company, of New York, (42 Missouri R., 156,) is very much in point here. *There* the loss was by a burning by the rebel soldiers, without any evidence to show it to have been done under orders from any officer in command. The language of the exception in the policy in that case was identical with this. And the Court held "that the clause of exclusion was intended to cover acts of spoliation or burning committed by soldiers, with or without any direct orders from superior officers." The rebel army in that case, as the Federal

army in this case, had possession and military control of that particular section of the country, and therefore was properly responsible for the direction and course of events. In the opinion the Court said:

"It would be doing violence to the language which the parties have seen fit to use, and would be, also, a strained and unnatural interpretation of their meaning, to say that the insurer would be liable in all cases, except where he could show that the burning took place by the order of the officer in command."

The case of Drinkwater *vs.* London Assurance Company (2d Wils. R., 363,) is referred to in the argument on the other side. But that was the case of a common mob, which had assembled at Norwich, in 1766, in consequence of the high price of provisions, and had burned down a malting house that had been insured by the company. The language of the exception in the policy was materially different—not containing the word *riot*, and the question was simply whether the property had been destroyed by a *usurped power*. The court was divided, but three of the judges were of the opinion that the words "usurped power" could not be construed to include a common mob, &c. The words of the exception in the policy in that case were, "damage happening by any invasion, foreign enemy, or any military or usurped power."

The terms *riot and civil commotion* were subsequently added to the form of this exception, in policies of insurance. (Langdale *vs.* Mason; Park on Ins., 965, 8th Eng. ed.; 2d Marsh, on Ins., 792.) Angel on Fire and Life Ins., 180 and 181, notices the progressive changes in the phraseology of this exception in policies, and the successive judicial interpretations. When the case of Drinkwater was decided, the law of insurance may be

said to have been somewhat in its infancy, and the rule of interpretation there alluded to has been long since modified. The rules of construction applicable to contracts generally, are now applied to policies of insurance. The words used are to be taken in their common and known signification, and the intention of the parties manifested is to be observed. (Parsons on Shipping, Insurance, &c., 2d vol., p. 48, 49, and 50; 1 Phillips on Insurance, 696, 3d ed.)

The case of Dupin *vs.* Mutual Insurance Company (5 La. R., Annual,) throws some light on the question here involved. There it was held that the word "riot," used in this connection, applied to a riotous assemblage, even where originally assembled for a lawful purpose, but afterward perpetrating unlawful and criminal acts. And in that case there was no evidence showing *the number of the persons* assembled and co-operating. That was presumed. In the case now before the court, although but two persons fired the house, a much larger number were in sight, and at a convenient distance, co-operating, and ready to render assistance and give protection in the transaction, should it be found necessary. (See p. 39, 40, 41, and 42 of the Record.)

If, in this case, the loss did not fall within the occurrences brought about by means of the insurrection and civil commotion then existing and convulsing this entire country—if it were not an incident to the war then existing—if the voice of the civil authority had not been silenced amid the tumultuous commotion prevailing, then it was a "*riot*," which the exception in the policy had expressly provided for. It is idle to discourse about this arson being the act of only two men. The two men

went there the evening before, in company with over thirty more men, and spent the night there, aggressing upon the sanctity of a private dwelling, in a most unkind and ruthless manner, and so pregnant with *the intent* to destroy or burn down the house, that the soldiers generally were unable to suppress their open declaration of it to the servants about the house. In the morning the soldiers were all placed in the ranks, and marched off under the command of the officer, in double file, to a convenient distance in sight of the house, where they halted and remained, while two of the men went back and fired the house. Afterward, on the same day, the whole squad, with many more soldiers, came back to look at the ruins. The inference that the whole squad were in complicity with the two who fired the house, is irresistible; and that the object of the incursion was to effect that purpose, is not to be doubted. And that this movement was only a part of the general purpose of the military force stationed at Glasgow, at the time, to scour the surrounding country to clean out the rebels and spies, is too plain to be doubted.

Now the most palpable fault of the charge of the court to the jury was, that it precluded the inquiry of the jury into the truth and actual state of the facts. The first clause of the charge is, "that if the house was burned by a *few soldiers*, not acting *at the time* as an organized force, but through their own private wantonness, malice, or revenge, and without any orders or authority from any officer to whose command they belonged," &c., then the said firing *was not within the exception* of the policy, &c. This did not meet the case. The two soldiers who went back and fired the house may not be said to have been themselves, at that particular time, an "or-

ganized force," and they may not have been acting under any direct or express orders of a superior officer, which could possibly be shown, and yet acting in accordance with the general purpose, and within the scope of the general plan of the military operations of the army at Glasgow. But an inquiry into this was precluded by the charge. The soldiers firing the house may have acted under feelings of wantonness, malice, and revenge, as soldiers in the field often do, and yet within the scope of their military duty. Admitting all the circumstances of exclusion mentioned in the charge, and yet these few soldiers may have been acting *in complicity* with the balance of the squad which were then in sight, and also in accordance with the general purposes of the army at Glasgow, an inquiry into which, by the jury, the charge restrained.

The second clause of the charge is, "or if a few soldiers, having left their military command, or organized force, for the purpose of firing the house, through private wantonness, malice, or revenge, did so fire the same, without any order or authority from any officer in command," then the same was not within the exceptions of the policy, &c. The two soldiers did manifestly leave the balance of the squad, which was then in view, and at least with the acqniescence of the officer in command, but whether under positive and express orders from the officer, or whether acting from the promptings of patriotism or feelings of private wantonness, was immaterial in this case. All the circumstances of exclusion in the charge may have been true, and yet these soldiers, in burning the property, have been knowingly acting in accordance with, and in furtherance of, the operations of the army in the field

to which they belonged; and yet a free and full inquiry into this by the jury was stifled by the narrow scope of the language used.

But if these two soldiers were not acting within the scope of the military operations, but were simply committing private depredations, and that in complicity with the other soldiers, who had declared their intention to burn the house, and who were waiting at a convenient distance, ready to render succor, should it become necessary, then it was a riot, and fell within the exception in the policy. But the circumscribed terms of the charge precluded an inquiry into this by the jury.

The fair administration of justice requires a reversal of the judgment and new trial.

Respectfully submitted,

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